No. 08-1065
Title: Pottawattamie County, Iowa, et al., Petitioners
v.
Curtis W. McGhee, Jr., et al.
Docketed: February 20, 2009
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (07-1453, 07-1524)
Decision Date: November 21, 2008
Questions Presented

Date	Proceedings and Orders
Feb 17 2009	Application (08A711) for a stay pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Alito.
Feb 18 2009	Petition for a writ of certiorari filed. (Response due March 23, 2009)
Feb 19 2009	Response to application from respondents Curtis W. McGhee, Jr., et al. filed.
Feb 19 2009	Reply of applicant Pottawattamie County, Iowa, et al. filed.
Feb 20 2009	Response to application from respondents Terry J. Harrington, et al. filed.
Feb 20 2009	Application (08A711) granted by Justice Alito. The proceedings in the United States District for the Southern District of Iowa, in case Nos. 4:05-cv-00255 and 4:05-cv-00178, are stayed pending disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.
Mar 17 2009	Brief of respondent Terry J. Harrington in opposition filed.
Mar 17 2009	Brief of respondent Curtis W. McGhee, Jr. in opposition filed.
Mar 23 2009	Motion for leave to file amici brief filed by National Association of Assistant United States Attorneys, et al.
Mar 31 2009	Reply of petitioners Pottawattamie County, Iowa, et al. filed.
Apr 1 2009	DISTRIBUTED for Conference of April 17, 2009.
Apr 20 2009	Motion for leave to file amici brief filed by National Association of Assistant United States Attorneys, et al. GRANTED.
Apr 20 2009	Petition GRANTED.
May 6 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including July 6, 2009.
May 27 2009	The time within which to file respondents' briefs on the merits is extended to and including September 11, 2009.
Jun 19 2009	The time within which to file the joint appendix and petitioners' brief on the merits is further extended to and including July 13, 2009.
Jul 13 2009	Joint appendix filed (statement of costs received).
Jul 13 2009	Brief of petitioners Pottawattamie County, Iowa, Joseph Hrvol, and David Richter filed.
Jul 20 2009	Brief amicus curiae of United States filed.
Jul 20 2009	Brief amici curiae of National Association of Assistant United States Attorneys, et al. filed.
Jul 20 2009	Brief amici curiae of National Association of Counties, et al. filed.
Jul 20 2009	Brief amicus curiae of Cook County filed.

Jul 20 2009	Brief amici curiae of Colorado, et al. filed.
Aug 4 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 17 2009	SET FOR ARGUMENT ON Wednesday, November 4, 2009
Aug 17 2009	CIRCULATED.
Sep 3 2009	Record received from U.S.C.A. for 8th Circuit. (1 envelope)
Sep 4 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 6 2009	Record for the U.S.D.C.for Southern District of Iowa is electronic.
Sep 11 2009	Brief of respondents Curtis W. McGhee, Jr., et al. filed. (Distributed)
Sep 16 2009	Motion to allow Stephen S. Sanders to argue pro hac vice filed by petitioners Pottawattamie County, Iowa, et al.
Sep 18 2009	Brief amicus curiae of Black Cops Against Police Brutality filed. (Distributed)
Sep 18 2009	Brief amicus curiae of The Center on the Administration of Criminal Law filed. (Distributed)
Sep 18 2009	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Sep 30 2009	Motion to allow Stephen S. Sanders to argue pro hac vice filed by petitioners GRANTED.
Oct 13 2009	Reply of petitioners Pottawattamie County, Iowa, et al. filed. (Distributed)
Nov 4 2009	Argued. For petitioners: Stephen Sanders, Chicago, Ill. (Pro hac vice); and Neal K. Katyal, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Paul D. Clement, Washington, D.C.

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No.

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

TERRY J. HARRINGTON
AND CURTIS W. MCGHEE JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial.

PARTIES TO THE PROCEEDING

Petitioners Pottawattamie County, Iowa, Joseph Hrvol, and David Richter are defendants in the district court and were appellants in a collateral order doctrine appeal in the Eighth Circuit. Matthew Wilber also was an appellant in the Eighth Circuit appeal on a question not related to the issues in this petition, and thus he is not a party before this Court. Respondents Terry J. Harrington and Curtis W. McGhee Jr. are plaintiffs in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Pottawattamie County, Iowa, Joseph Hrvol, and David Richter respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit (App., *infra*, 1a-20a) is reported at 547 F.3d 922. The district court's opinion (App. *infra*, 21a-155a) is reported at 475 F. Supp. 2d 862.

JURISDICTION

The Eighth Circuit entered judgment on November 21, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

This petition addresses a critical issue of federal law related to prosecutorial immunity on which, as the following background shows, the circuits are divided.

The plaintiffs in this case, Terry J. Harrington and Curtis W. McGhee Jr. (hereinafter "respondents"), were tried and convicted in 1978 for the murder of an auto dealership security guard in Council Bluffs, Iowa. The Iowa Supreme Court vacated Harrington's conviction in 2003, based on a finding that petitioners had failed to disclose exculpatory evidence of an alternative suspect. *Harrington* v. *State*, 659 N.W.2d 509 (Iowa 2003). Following that decision, McGhee, whose conviction was based on essentially the same facts and evidence, entered an *Alford* plea to second-degree murder in exchange for a sentence of time served. Harrington was not retried.

In 2005, respondents sued petitioners in the United States District Court for the Southern District of Iowa under 42 U.S.C. § 1983 and other causes of action, alleging *inter alia* that former county attorneys Joseph Hrvol and David Richter had coerced false witness testimony during the criminal investigation of respondents; subjected respondents to false arrest; introduced false testimony against respondents at trial; and withheld exculpatory evidence. Respondents did not allege that petitioners had subjected them to malicious prosecution.

Petitioners moved for summary judgment based on absolute immunity, qualified immunity, and other defenses. In an opinion and order on February 23, 2007, the district court dismissed claims against pe-

titioners that were based on withholding of exculpatory evidence. Petitioners were absolutely immune from those claims, the district court held, because "failure to turn over exculpatory evidence is necessarily a function intimately associated with the judicial process." App., *infra*, 85a (citing *Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.34 (1976)).

However, the district court denied immunity to the extent that respondents' claims arose from allegations that petitioners had coerced false testimony from witnesses that was later introduced at trial. The district court held that such allegations were "sufficient to state a substantive due process claim," App., *infra*, 104a, and that a constitutional right against such conduct by a prosecutor was "clearly established." *Id.* at 114a.

In holding that petitioners could be subjected to trial and potential liability for procurement and use of false testimony, the district court expressly rejected contrary authority from the Seventh Circuit. App., *infra*, 104a. In *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995),[1] the Seventh Circuit held that procurement of false testimony by a prosecutor, without more, does not violate any of a criminal defendant's constitutional rights. Further, the Seventh Circuit explained, the *use* of such testimony in judicial proceedings is shielded by absolute immunity. *Ibid.*

In this case, the district court not only rejected the Seventh Circuit's analysis as "unpersuasive,"

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[1] To avoid confusion with an earlier decision by this Court in the same case, *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), which is discussed elsewhere in this petition, petitioners will refer to the Seventh Circuit decision as "*Buckley II*."

App., *infra*, 104a, it relied on the *dissent* in *Buckley II*. The district court opined that a prosecutor "should not be immune from § 1983 liability" for procuring false testimony, because such conduct "'*ripen[s] into* a § 1983 cause of action * * * *by use of the perjured testimony at trial.*'" *Id.* at 107a (quoting *Buckley II*, 20 F.3d at 800 (Fairchild, J., dissenting)) (emphasis added). Thus, although petitioners argued that qualified immunity shielded them from suit because procurement of false evidence does not, in itself, violate any clearly established constitutional right, the district court not only denied that defense, it effectively abrogated *absolute* immunity for the *use* of that testimony *at trial*. As a result, the court allowed respondents to seek to hold petitioners liable for the consequences of the testimony, namely, respondents' convictions and incarcerations.

Petitioners brought an appeal under the collateral order doctrine to the Eighth Circuit. See *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). In accordance with the Seventh Circuit's decision in *Buckley II*, they argued that only the use of false testimony, not merely its procurement, could have violated Harrington and McGhee's constitutional rights, and that the use of such testimony at trial was shielded by absolute immunity. See App., *infra*, 17a-18a.

The Eighth Circuit rejected this argument. *Id.* at 18a-19a. Instead, with only brief discussion, it affirmed the district court's analysis, holding that a prosecutor's procurement of false testimony "violates a [criminal defendant's] substantive due process rights." *Id.* at 19a.

Relying on a case from the Second Circuit, *Zahrey* v. *Coffee*, 221 F.3d 342 (2d Cir. 2000), the

Eighth Circuit further held that a prosecutor is not immune for procurement of false evidence "where the prosecutor was accused of *both* fabricating evidence *and then using the fabricated evidence at trial*," resulting in a post-trial "deprivation of liberty." App., *infra*, 18a (citing *Zahrey*, 221 F.3d at 344, 349) (emphasis added and internal quotation marks omitted). The Eighth Circuit acknowledged that this reasoning was "in tension, if not conflict, with" the Seventh Circuit's *Buckley II* decision. *Ibid.* (internal quotation marks omitted).

Thus, in ostensibly denying *qualified* immunity for *procurement* of false testimony during an *investigation*, the Eighth Circuit effectively abrogated *absolute* immunity for the *use* of that testimony *at trial*, thereby making petitioners potentially liable in damages for wrongful conviction and incarceration.

The Eighth Circuit refused to stay its mandate, and the case has now returned to the district court, where petitioners are being subjected to the burdens of time-consuming and expensive trial preparations from which they would be shielded under ordinary immunity principles. Trial is scheduled to begin on August 3, 2009.

REASONS FOR GRANTING THE PETITION

This Court has recognized that prosecutorial immunity is an "important and recurring issue." *Imbler*, 424 U.S. at 417; see also *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 860 (2009) (calling prosecutorial immunity a "serious" concern). "[T]he absolute immunity that protects the prosecutor's role as an advocate is not grounded in any special esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because

any lesser degree of immunity could impair the judicial process itself." *Kalina* v. *Fletcher*, 522 U.S. 118, 127 (1997) (internal quotation marks and citation omitted).

The Eighth Circuit held that a prosecutor has no immunity from suit where he allegedly procured false testimony during an investigation, then introduced the same testimony at trial, resulting in a post-trial deprivation of liberty. The Eighth Circuit supported that decision by finding a "substantive due process" right against procurement of false evidence — a right that, far from being "clearly established," has no basis whatsoever in this Court's precedents. This ruling widens and deepens a circuit split on a critical question of federal law, misapprehends both the constitutional protections and the immunities applicable at distinct stages of the criminal process, and violates this Court's "function test" for prosecutorial immunity.

The Eighth Circuit's decision creates a dramatic and unprecedented new rule infringing prosecutorial immunity, a rule whose ramifications extend far beyond this case. Review is warranted to resolve a serious conflict among the circuits and to prevent prosecutors from being exposed to damages liability in violation of this Court's precedents.

I. The Eighth Circuit's Decision Widens And Deepens A Split Among The Circuits On The Critical Issue Of Prosecutorial Immunity.

The decision below squarely conflicts with authority from another circuit—the Seventh Circuit's decision in *Buckley II*—on a critical question of federal law: whether a prosecutor (1) may be sued on al-

legations that he procured false testimony, and then (2) face liability for a wrongful conviction because he introduced that same testimony at trial. What's more, the decision below widens and deepens what has become a *multi-circuit* split: the Eighth Circuit relied on the Second Circuit's *Zahrey* decision, which itself had rejected *Buckley II*. Meanwhile, the Third Circuit has followed *Buckley II*.

The relevant facts in *Buckley II* are virtually identical to the facts in this case. In *Buckley II*, the plaintiff, Stephen Buckley, alleged that prosecutors had violated his constitutional rights by coercing false statements from third parties through use of reward money, including co-defendant Rolando Cruz, then using this false testimony in Buckley's indictment and trial. 20 F.3d at 794-795.

On the issue of procuring false testimony, the Seventh Circuit noted that Buckley had not been able to identify "any case holding that this practice violates the Constitution. * * * His contention that the [reward money] payments [to witnesses] themselves violate the due process clause does not state a claim on which relief may be granted." 20 F.3d at 794.

> Let us suppose the prosecutors put Cruz on the rack, tortured him until he named Buckley as his confederate, and then put the transcript in a drawer, or framed it and hung it on the wall but took no other step, or began a prosecution but did not introduce the statement. Could Buckley collect damages under the Constitution? Surely not; Cruz himself would be the only victim.

Id. at 795.

If a prosecutor actually *used* such false testimony in judicial proceedings, the Seventh Circuit went on to explain, then absolute immunity would shield him from a damages suit.

> [I]f the constitutional entitlement is a right to prevent use of the confession at trial (or before the grand jury), then absolute immunity under *Imbler* defeats Buckley's claim. *Obtaining* the confession is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity. * * * Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs.

20 F.3d at 795 (citing *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 267 n.3 (1993); *Burns* v. *Reed*, 500 U.S. 478, 489-490 & n.6 (1991)) (emphases in original).

In this case, the Eighth Circuit provided a much different analysis.

First, it said that a prosecutor's procurement of false testimony, without more, violates a criminal defendant's "substantive due process rights." App., *infra*, 19a. Not only does this notion directly conflict with Seventh Circuit law, but such a "substantive due process" right against procurement of false evidence, far from being "clearly established," has no basis in this Court's precedents.

Then, drawing on the Second Circuit's *Zahrey* decision, the Eighth Circuit reasoned that a prosecutor has no immunity where a "'deprivation of liberty * * * can be shown to be the result of [the prosecu-

tor's] fabrication of evidence' where the prosecutor was accused of both fabricating evidence and *then using the fabricated evidence at trial*." App., *infra*, 18a (quoting *Zahrey*, 221 F.3d at 344, 349) (bracketed alteration in original, emphasis added).

Although it nominally recognized that the county attorneys in this case had absolute immunity for their use of evidence at trial, the Eighth Circuit effectively abrogated that immunity by conflating *procurement* and *use at trial* into one undifferentiated "constitutional violation" that results in a post-trial "deprivation of liberty." App., *infra*, 17a-18a. This result is completely at odds with the longstanding principle that a prosecutor may not be held liable in damages for a wrongful conviction based on actions he took at trial.

The Eighth Circuit let stand the district court's reasoning, drawn from the dissent in *Buckley II*, that "prosecutors should not be immune from § 1983 liability 'for their non-advocacy wrongful conduct if [a former criminal defendant] can prove that indictment and trial would not have occurred in the absence of the product of the wrongful conduct.'" App., *infra*, 107a. But this conclusion too finds no support in this Court's precedents. Such but-for reasoning might, at most, support a claim for wrongful *institution* of criminal proceedings. But respondents have not alleged malicious prosecution against petitioners, and even if they had, petitioners would be immune, because a prosecutor's decision to initiate a prosecution is shielded by absolute immunity. *Imbler*, 424 U.S. at 421-424. Such speculative reasoning cannot bear the weight of the holdings below that *procurement* of false evidence during an *investigation* later "ripens" into a *trial* violation, thus exposing a prose-

cutor to potential liability for conviction and incarceration.

The circuit split in this case involves not just the Seventh and Eighth circuits, but the Second and Third circuits as well.

Like the Eighth Circuit here, the Second Circuit in *Zahrey* rejected the Seventh Circuit's analysis in *Buckley II* and instead followed the *Buckley II* dissent. See *Zahrey*, 221 F.3d at 354-355. *Zahrey* involved a prosecutor who allegedly fabricated evidence against a New York City police officer for use in criminal and police disciplinary proceedings. The target of the proceedings, Zaher Zahrey, was indicted and arrested based on the false evidence, but was subsequently acquitted.

Zahrey announced what the Second Circuit called a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity." 221 F.3d at 349. The Second Circuit reasoned that if a prosecutor fabricated evidence during the investigative phase of a proceeding, when he had only qualified immunity, then "it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that Zahrey would be indicted and arrested." *Id.* at 354.

The Second Circuit's analysis essentially erased the important distinction between a prosecutor's investigative and advocacy roles—a distinction central to what this Court has called the "functional approach" to immunity. *Burns*, 500 U.S. at 486. The *Zahrey* court's reasoning elides the fact that a prosecutor is absolutely immune for presentations to a grand jury. *Imbler*, 424 U.S. at 430-431. Hence, it is

irrelevant whether it was "reasonably foreseeable" that the prosecutor in *Zahrey* would place before the grand jury false evidence that he had earlier procured. In *Zahrey*, the Second Circuit bypassed the "functional approach" and carved out an exception to fundamental immunity principles based on nothing more than an improvised and fallacious theory of proximate cause.

Significantly, the deprivation of liberty in *Zahrey* was limited to the period between arrest and trial. Because Zahrey was acquitted and thus suffered no post-trial deprivation of liberty, the Second Circuit had no basis to consider whether a prosecutor who procures false evidence could also, in effect, be held liable for wrongful conviction and post-trial incarceration. Yet that is the context in which the Eighth Circuit applied *Zahrey* here, exposing petitioners to potential liability for a murder conviction and a long period of incarceration.

While *Buckley II* has been rejected by the Second and Eighth Circuits, it has been followed by the Third Circuit. In *Michaels* v. *New Jersey*, 222 F.3d 118 (3d Cir. 2000), a criminal defendant alleged that her constitutional rights were violated when a prosecutor and other investigators employed coercive techniques against witnesses, then used the evidence to obtain an indictment and conviction (which was later reversed). Relying on *Buckley II*, the Third Circuit said that the techniques used to interview the witnesses "did not violate [the plaintiff's] constitutional rights," and that the prosecutor "was entitled to absolute immunity in offering the unreliable evidence." *Id.* at 122. Thus, the Eighth Circuit's decision in the present case also directly conflicts with law from the Third Circuit.

In summary, review is warranted to resolve what has become a four-circuit split on a critical question of federal law.

II. The Eighth Circuit's Decision Cannot Be Reconciled With This Court's Precedents.

A. The decision below fails to analyze constitutional violations with particularity.

The Eighth Circuit and the district court theorized that when a prosecutor procures false testimony during a criminal investigation when he has only qualified immunity, such conduct works a "substantive due process" violation, which the courts below apparently understood as an injury that begins before a criminal defendant is even arrested, "ripens" into a § 1983 violation when the testimony is used at trial, and extends through a post-trial deprivation of liberty. The only support from this Court's cases offered for this proposition in either of the decisions below was the district court's citation to *Reno* v. *Flores*, 507 U.S. 292, 301-302 (1993). App., *infra*, 104a. *Reno*, however, had nothing to do with false evidence or criminal proceedings but rather with an unsuccessfully asserted liberty interest on the part of detained juvenile aliens to be released into a "'noncustodial setting.'" 507 U.S. at 302.

The decisions below fly in the face of this Court's teaching that constitutional violations must be described with particularity, then evaluated in light of specific constitutional guarantees.

Where immunity defenses are involved, "it is important to determine the precise claim that [a plaintiff] has made against [a prosecutor] concerning [the prosecutor's] role in the" particular phase of the criminal proceeding at issue. *Burns*, 500 U.S. at 487.

Moreover "if a constitutional claim is covered by a specific constitutional provision * * * the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States* v. *Lanier*, 520 U.S. 259, 272 n.7 (1997); accord *Albright* v. *Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims") (internal quotation marks omitted). The Eighth Circuit failed to perform this careful, particularized analysis of respondents' alleged injuries.

First, it is highly doubtful that the act of procuring false testimony, in and of itself, is a "substantive due process" violation, as the Eighth Circuit held. That is because there is "no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

In this case, respondents allege harms at two distinct phases of the criminal process: that petitioners (1) subjected them to wrongful arrest based on false testimony the county attorneys had procured, and then (2) wrongfully introduced that same testimony at respondents' murder trials. Both of these injuries fall under well recognized constitutional rubrics. By lumping them together as one undifferentiated "constitutional violation," the Eighth Circuit failed to "determine the precise claim[s]" and the

immunity principles applicable to each injury. *Burns*, 500 U.S. at 487.

If an investigating prosecutor uses false testimony to fabricate probable cause and thereby obtain a false arrest, that act may constitute an illegal seizure in violation of the Fourth Amendment. *Albright*, 510 U.S. at 274 ("The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it"). In such circumstances, the prosecutor would have only qualified immunity. *Buckley*, 509 U.S. at 274 (prosecutor does not have absolute immunity "before he has probable cause to have anyone arrested"). But the injury from such a violation is temporally limited. Damages for false arrest "cover the time of detention up until issuance of process or arraignment, but not more. From that point on, any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself." *Wallace v. Kato*, 549 U.S. 384, 390 (2007) (citation and internal quotation marks omitted).

Thus, in this case, should respondents' false-arrest claim survive[2] and should they be able to prove that the county attorneys had them arrested based on false testimony, petitioners could be subject to trial and liability for respondents' brief detention following their arrests, but nothing more. The scope of the issues and evidence necessarily would be sharply circumscribed and limited to the allegations of false arrest. (Respondents have not alleged malicious prosecution against petitioners.)

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[2] The district court has not yet acted on petitioners' pending motion to dismiss the false-arrest claims on statute of limitations grounds, based on *Wallace* v. *Kato*, 549 U.S. 384 (2007).

By contrast, if a prosecutor knowingly introduces false testimony in judicial proceedings, that act constitutes a completely different constitutional violation—a violation of the 14th Amendment's guarantee of *procedural* due process related to trial. *Alcorta* v. *Texas*, 355 U.S. 28, 31 (1957); *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942); *Mooney* v. *Holohan*, 294 U.S. 103, 112-113 (1935). Such a trial violation may, of course, entitle a criminal defendant to post-conviction relief such as a new trial. See *Napue* v. *Illinois*, 360 U.S. 264, 272 (1959). But absolute immunity applies with "full force" when a prosecutor engages in activities that are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Such absolute immunity applies even to the "willful use" by a prosecutor at trial of perjured or false testimony, *id.* at 431 n.34—precisely what respondents allege in this case.

Given this absolute immunity, the fact and consequences of any use that petitioners made of allegedly false testimony at respondents' criminal trials could not properly be an issue—indeed, it could not properly be discussed or entered into evidence—in the pending district court trial.

As a matter of simple logic, the only way petitioners' alleged *procurement* of false testimony could have caused respondents' convictions and post-trial incarcerations was through *use* of that testimony at trial. Yet neither the district court nor the Eighth Circuit provided any authority from this Court that a prosecutor may be held answerable in damages for such a trial violation. Instead, the courts below simply conflated procurement and use into one undifferentiated "constitutional violation" based on "substantive due process." The district court went astray in

its analysis (an analysis the court of appeals let stand) by pointing to precedents such as *Mooney* and *Napue*, which are about *post-conviction relief* for *trial violations*, as support for the proposition that respondents had a "clearly established" right to seek *damages* for an investigating prosecutor's mere *procurement* of false evidence. App., *infra*, 114a.

The theory that procurement followed by use at trial of false testimony works one continuous constitutional violation also cannot be reconciled with this Court's teaching that a discrete violation at an early point in a criminal proceeding does not automatically trigger further constitutional harms at later stages of the process.

For example, in *Wallace*, this Court emphasized the difference between false arrest and torts related to prosecution and trial, and it explained that a false arrest in violation of the Fourth Amendment does not "set the wheels in motion for [a] subsequent conviction and detention." 549 U.S. at 391. By the same token, a prosecutor's procurement of false testimony, even if that act were in itself a constitutional violation, does not "set the wheels in motion" for a later violation at trial.

The notion that a prosecutor who procured false evidence during an investigation must be answerable in damages for a post-conviction deprivation of liberty disregards any analysis of causation and the requirement that false testimony at trial must be evaluated for harmless error. See *Arizona* v. *Fulminante*, 499 U.S. 279, 295 (1991); WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE 1110 (3d ed. 2000) ("Because the *Mooney* principle is based upon the defendant's right to a fair trial, the Court has refused to go so far as to hold that the knowing failure to correct

false testimony produces a due process violation without regard to whether the false testimony was likely to have had an impact upon the outcome of the trial"). Under harmless error analysis, the weight of evidence may support a conviction even though a prosecutor relied in part on false testimony that he procured.[3] Yet under the Eighth Circuit's ruling, the mere act of procuring false testimony not only subjects a prosecutor to suit, it potentially exposes him to damages liability for all the harmful consequences suffered by the criminal defendant, including conviction and incarceration. Absolute immunity may not be effectively abrogated based on such an overreaching conclusion.

In summary, the outcome below rests on a fundamentally flawed premise: that a prosecutor may be held liable for a wrongful conviction and detention because the procurement of false testimony during an investigation "'ripen[s] into a § 1983 cause of action * * * by use of the perjured testimony at trial.'" App., *infra*, 107a (quoting *Buckley II*, 20 F.3d at 800 (Fairchild, J., dissenting)). This proposition directly conflicts with this Court's jurisprudence.

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[3] In this case, the Iowa Supreme Court vacated Harrington's conviction based not on the county defendants' alleged procurement of false evidence or the role that evidence played at trial, but rather on a *Brady* violation for withholding of exculpatory evidence. *Harrington* v. *State*, 659 N.W.2d 509, 525 (Iowa 2003). Because such a *Brady* violation occurs during the trial process, the district court has held that the county defendants have absolute immunity from this allegation.

B. The decision below violates this Court's "function test" for prosecutorial immunity.

It is well established that a prosecutor does not have absolute immunity during the *investigative* phase of a criminal proceeding, and that absolute immunity during the *judicial* phase does not "retrospectively" immunize earlier wrongful acts. *Buckley*, 509 U.S. at 276. But according to the Eighth Circuit's ruling, under which a prosecutor is answerable in damages for a wrongful conviction and incarceration, a prosecutor's liability for procuring false testimony during an investigation (assuming that such an act violates some constitutional right) *spreads forward* and effectively abrogates absolute immunity when the prosecutor later introduces that testimony at trial.

This result contravenes the "functional approach" to prosecutorial immunity this Court has prescribed. *Burns*, 500 U.S. at 486; see also *Buckley*, 509 U.S. at 273 (describing the "function test"). The key determinant for immunity is whether a prosecutor is performing a function that is "intimately associated with the judicial phase of the criminal process." *Buckley*, 509 U.S. at 270. Accordingly, a prosecutor receives only qualified immunity when he "performs the investigative functions normally performed by a detective or police officer." *Id.* at 273. But this Court has "not retreated * * * from the principle that acts undertaken by a prosecutor * * * which occur in the course of his role as an advocate for the State[] are entitled to the protections of absolute immunity." *Ibid.* This rule is "categorical[]." *Kalina*, 522 U.S. at 126.

In *Buckley*, Justice Scalia anticipated the exact scenario presented here and explained why a criminal defendant in such a case could have no claim of any sort against a prosecutor.

> Insofar as [Buckley's claims] are based on [prosecutor]s' supposed knowing *use* of fabricated evidence * * * at trial — acts which might state a claim for denial of due process, see, *e.g.*, *Mooney* — the traditional defamation immunity provides complete protection from suit under § 1983. If reframe[d] * * * to attack the preparation of that evidence the claims are unlikely to be cognizable under § 1983, since petitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution.

Buckley, 509 U.S. at 281 (Scalia, J., concurring) (citations and internal quotation marks omitted, bracketed alteration in original).

Petitioners do not dispute that the county attorneys were functioning as investigators at the time they allegedly procured false testimony against respondents; accordingly, only qualified immunity applied. But since the mere act of procuring false evidence does not violate any "clearly established" constitutional right, petitioners can have no claim at this stage. Later, when the county attorneys introduced that testimony at trial, they plainly were functioning as "advocate[s] for the State," and that conduct was covered by *absolute* immunity. Thus, there is no basis for *any* liability stemming from the alleged false testimony.

To hold, as the Eighth Circuit did, that a prosecutor effectively forfeits immunity "where the prosecutor was accused of both fabricating evidence and then using the fabricated evidence at trial," App., *infra*, 18a, elides the functional analysis that this Court has mandated. It is simply an example of "allow[ing] * * * particular policy concerns to erase the function test." *Buckley*, 509 U.S. at 274 n.5.

In summary, review is warranted because the Eighth Circuit's decision conflicts with this Court's precedents on fundamental points of constitutional criminal procedure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2009

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 07-1453

Curtis W. McGhee, Jr.,
Appellee,

v.

Pottawattamie County, Iowa;
Joseph Hrvol; David Richter,
Appellants.

Terry Harrington, individually and in his capacity as the father of Nicole Antoinette Harrington,
Appellee,

v.

County of Pottawattamie, Iowa: David Richter, in his individual and official capacities; Joseph Hrvol, in his individual and official capacities,
Appellants.

Appeals from the United States District Court for the Southern District of Iowa.

No. 07-1524

Curtis W. McGhee, Jr.,
Appellee,

v.

Matthew Wilber,
Appellant.

Terry Harrington, individually and in
his capacity as the father of
Nicole Antoinette Harrington,
Appellee.

Submitted: May 15, 2008—Filed: November 21, 2008

Before RILEY, TASHIMA,[1] and SMITH Circuit Judges.

RILEY, Circuit Judge.

In 1978, Curtis W. McGhee Jr. (McGhee) and Terry Harrington (Harrington) were convicted of murdering John Schweer, a retired police department captain who was working as a security guard. McGhee and Harrington were each sentenced to life imprisonment. In 2002, the Iowa Supreme Court reversed Harrington's conviction and remanded for a new trial, finding the prosecutor committed a *Brady*[2] violation by failing to disclose evidence of an alternative suspect. The current prosecutor, Matthew Wilber (Wilber), concluded it would be impossible to

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[1] The Honorable A. Wallace Tashima, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

retry Harrington and also agreed to move to vacate McGhee's conviction. McGhee agreed to enter an *Alford*[3] plea to second degree murder in exchange for a sentence of time served. With the agreements, McGhee was released.

McGhee and Harrington both brought civil rights actions against Pottawattamie County, Iowa (County), and the former prosecutors and officers involved in the initial investigation and prosecution, arguing they used perjured and fabricated testimony and withheld evidence in violation of McGhee's and Harrington's constitutional rights. McGhee and Harrington also alleged Wilber defamed them. Defendants moved for summary judgment based on qualified and absolute immunity. The district court found some defendants were entitled to qualified immunity on certain claims and denied qualified immunity and absolute immunity on the remaining claims.

Defendants Joseph Hrvol (Hrvol) and David Richter (Richter) filed a consolidated interlocutory appeal from the denial of qualified, absolute, and sovereign immunity arguing the district court: (1) used an improper standard for determining probable cause in the absolute immunity analysis, (2) erred in waiving sovereign immunity for the prosecutors, and (3) erred in concluding McGhee and Harrington alleged a constitutional violation when the district court denied qualified immunity to Hrvol and Richter. Wilber also appeals the denial of his motion for summary judgment regarding McGhee's defamation claim, contending Wilber has sovereign and qualified immunity. We affirm in part and reverse in part.

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[3] *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

I. BACKGROUND

In July of 1977, John Schweer (Schweer), a retired police captain working as a night security guard at the McIntyre Oldsmobile dealership (McIntyre dealership) in Council Bluffs, Iowa, was shot and killed with a 12-gauge shotgun. Two Council Bluffs detectives, Daniel C. Larsen (Detective Larsen) and Lyle W. Brown (Detective Brown) (collectively, detectives) led the murder investigation with the active participation of Assistant County Attorney Hrvol participating in witness interviews and canvassing the neighborhood near the crime scene. Hrvol admits he was "intensely involved in the investigation," even though he was not yet assigned any role in the prosecution of the case.

Richter, the County Attorney, oversaw his office's participation in the murder investigation and received regular reports from Hrvol. Richter had been appointed as County Attorney in 1976 and would stand for election, for the first time, in 1978. Richter was campaigning in the face of Schweer's unsolved murder.

In the investigation's early stages, more than a dozen individuals were under suspicion, but McGhee and Harrington were not yet suspects. The best lead was Charles Gates, known to investigators as "the man with the dog and shotgun." Gates had been a suspect in a 1963 homicide investigation involving the murder of a female coworker of Gates. The detectives knew Schweer left a note at the McIntyre dealership the night before his murder noting Schweer had chased off someone who had a gun. A witness saw a man with a dog and a shotgun around the time of the murder, a man Detective Larsen determined was Gates. Richter personally interviewed

another witness who positively identified Gates as the person seen walking dogs in the vicinity of the murder. Two more witnesses also placed Gates near the scene of the murder in the relevant time frame. Richter and Hrvol went so far as to consult an astrologer regarding their suspicions of Gates. Gates submitted to a polygraph exam in which the examiner opined Gates was not truthful when he denied owning a shotgun and, more importantly, denied shooting Schweer. Eight reports dealing with Gates and the murder investigation were written by the Council Bluffs police, yet, Richter and Hrvol never disclosed any of this evidence to Harrington's or McGhee's trial or post-conviction relief counsel. Hrvol, in answering McGhee's post-conviction hearing discovery, went so far as to disavow any other suspects but McGhee, inaccurately answering that the "man and dog" (Gates) was "never found or identified."

The primary witness relied upon in bringing charges against McGhee and Harrington was Kevin Hughes (Hughes), a 16-year old with a long criminal record. Hughes was interrogated by both Fremont, Nebraska, and Council Bluffs, Iowa, police before the arrests of Harrington and McGhee. On September 9, 1977, Hughes, along with two other teenagers, was stopped in a Cadillac which had been stolen nine days earlier from a Fremont, Nebraska, car dealership. Hughes denied stealing the Cadillac, and identified Harrington, McGhee and Anthony Houston (Houston) as the men who stole the Cadillac and three other cars from dealerships in Fremont and Lincoln, Nebraska, and Council Bluffs, Iowa.

Detectives Larsen and Brown traveled to Lincoln to interview Hughes, telling Hughes they knew he

was involved in the car theft ring and the Schweer murder, but promised: (1) he would not be charged with the murder, (2) he would be helped with his other criminal charges, and (3) there was a $5,000 reward available, if Hughes helped the detectives with the Schweer murder. Hughes agreed to help.

Hughes's first written statement identified a light skinned man, later identified as Steven Frazier, as the man who told Hughes that he stole a Lincoln Continental from the McIntyre dealership, killing a security guard in the process. The detectives told Hughes they knew he was lying because no Lincoln was stolen from the McIntrye dealership.

Next, Hughes identified Arnold Kelly as involved in the murder. This was also demonstrably false as Kelly was in the Kansas City Job Corps at the time of the murder.

Harrington and McGhee assert that Hrvol, Richter, Detective Larsen and Detective Brown (1977 Defendants) began to pressure Hughes to implicate Harrington, McGhee and Houston in the Schweer murder, even though Hughes initially expressed his belief the three were incapable of murder. Hughes's story then changed again as he reported Harrington and the others told him they had murdered Schweer. Authorities accused Hughes of lying about this conversation. Once confronted, Hughes admitted to lying once more.

On September 30, 1977, Hughes told police he was at the McIntyre dealership when Schweer was murdered. The 1977 Defendants met with Hughes at the murder scene. After this visit, Hughes reported he was with Houston at the McIntyre dealership when the Schweer murder occurred. The 1977

Defendants knew Hughes was lying again because they already knew Houston was in jail at the time of the murder.

Hughes's story continued to change. When describing the murder weapon, Hughes first said Schweer was murdered with a pistol. This was wrong. Hughes next claimed a 20-gauge pump shotgun was the murder weapon, which was also inaccurate. Finally, only after being told by the 1977 Defendants a 12-gauge shotgun shell was found near the body did Hughes say a 12-gauge shotgun was the murder weapon.

In light of the changing stories, inaccuracies and inconsistencies, Detective Larsen considered Hughes's credibility suspect and later Detective Larsen admitted he always had problems with Hughes's final story. Nevertheless, a preliminary True Information charging Harrington with Schweer's murder was issued on November 16, 1977, and a similar preliminary True Information charging McGhee was issued on November 17, 1977, based on Hughes's accusations. Richter and Hrvol approved the decision to arrest McGhee and Harrington, who were arrested on November 17, 1977. A True Information charging McGhee and Harrington with first degree murder was filed on February 17, 1978.

At trial, the state's cases were based upon the testimony of: (1) Hughes, (2) the two other teens arrested with Hughes in the stolen Cadillac, (3) two other friends of Hughes, and (4) jailhouse informants who testified Harrington confessed while housed with or adjacent to them. McGhee and Harrington were found guilty in separate trials and sentenced to life.

Both McGhee and Harrington pursued post conviction relief, but were unsuccessful. Only after Anne Danaher[4] (Danaher) began an independent investigation did the extent of the Brady violations committed by Hrvol and Richter come to light. These Brady violations ultimately were the grounds upon which Harrington's conviction was overturned by the Iowa Supreme Court.

While Wilber dismissed all charges against Harrington and agreed to vacate McGhee's sentence, Wilber announced in a press conference and a press release his personal belief that he had no doubt Harrington had committed the murder, the jury made the right decision, and the "right man went to prison for over twenty-five years." Wilber stated he "owed it to the family of John Schweer to do my best on this case to bring his killer to justice a second time." Wilber concluded by saying "[a]s for the final justice for Terry Harrington, I will defer that honor to a higher power."

As for McGhee, Wilber said, "McGhee pleaded no contest today to a charge of second degree murder for the death of John Schweer . . . . Even though Mr. McGhee did not pull the trigger . . . our case against him was stronger than [the case] against Terry Harrington [as] . . . McGhee had made admissions to at least three different people about being with Terry Harrington when Harrington shot a police officer in Council Bluffs." Wilber noted these statements were not admissible against Harrington, but "would cer-

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[4] Danaher was an employee at the prison where Harrington was incarcerated. Danaher got to know Harrington and his family.

tainly come into evidence at a trial against Mr. McGhee."

Hughes, the other juvenile witnesses, and the jailhouse informants who testified against Harrington and McGhee have recanted their testimonies. Hughes admits he lied, first in hopes of garnering a proffered reward, and then in an attempt to avoid being personally charged with the murder and car thefts.

McGhee and Harrington both brought civil rights actions against the County and the former prosecutors and officers involved in the initial investigation and prosecution, arguing they used perjured and fabricated testimony and withheld evidence in violation of McGhee's and Harrington's constitutional rights. McGhee and Harrington also allege Wilber defamed them. Defendants moved for summary judgment based on qualified and absolute immunity. The district court found some defendants were entitled to qualified immunity on some claims, and denied qualified immunity and absolute immunity on the remaining claims. Hrvol and Richter filed this interlocutory appeal, which Wilber joined.[5]

II. DISCUSSION

In this interlocutory appeal, Hrvol and Richter assert the district court: (1) used an improper standard for determining probable cause in the absolute immunity analysis, (2) erred in waiving sovereign

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[5] Harrington also filed a defamation claim against Wilber. The district court denied Wilber's motion for summary judgment on Harrington's defamation claim. *See Harrington v. Wilber*, 353 F. Supp. 2d 1033, 1048 (S.D. Iowa 2005). Because Wilber did not appeal this decision, we will not consider this claim.

immunity for the prosecutors, Hrvol and Richter, and (3) erred in concluding McGhee and Harrington alleged a constitutional violation when the district court denied qualified immunity to Hrvol and Richter. Wilber appeals the denial of his motion for summary judgment in regards to McGhee's defamation claim on the basis Wilber has sovereign and qualified immunity.

A. Jurisdiction

We ordinarily lack jurisdiction over an interlocutory appeal challenging the denial of a summary judgment motion, but when a summary judgment motion based on sovereign immunity or qualified immunity is denied, an interlocutory appeal "is appropriate because immunity from suit is effectively lost if the party claiming it is erroneously forced to stand trial." *Monroe v. Ark. State Univ.*, 495 F.3d 591, 593-94 (8th Cir. 2007) (internal alterations, quotation marks and citations omitted). Hrvol, Richter and Wilber all assert the district court erred in finding they were not shielded by sovereign or qualified immunity. Thus, we have jurisdiction to determine if the appellants' motions for summary judgment based upon sovereign and qualified immunity were improperly denied.

B. Standards of Review

"We review de novo the district court's denial of summary judgment on qualified immunity grounds, construing the evidence in the light most favorable to the nonmoving party." *Dible v. Scholl*, 506 F.3d 1106, 1109 (8th Cir. 2007) (citation and emphasis omitted). We review de novo as well "the question of whether a state (or its agencies and officials) has

waived sovereign immunity." *Doe v. Nebraska*, 345 F.3d 593, 597 (8th Cir. 2003) (citation omitted).

C. Absolute Immunity and Probable Cause

Before the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993) ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.") (footnote reference omitted). Defendants assert the district court erred in determining probable cause was not present at the time Harrington and McGhee were arrested for Schweer's murder and thereby determining Hrvol and Richter were not entitled to absolute immunity. Specifically, defendants assert probable cause justified arresting Harrington and McGhee for car theft and, because probable cause exists to support arrests for car theft, then Hrvol and Richter are entitled to absolute immunity. Defendants raised this argument in the district court for the first time in their summary judgment reply brief. The district court did not consider this argument. *See* S.D. Iowa L.R. 7(g) (A reply brief may be filed "to assert newly-decided authority or to respond to new and unanticipated arguments made in the resistance [brief]."); *see also Jones v. Shalala*, 887 F. Supp. 210, 214 n.3 (S.D. Iowa 1995) ("[T]he reply brief submitted by [defendants] is not in compliance with the local rule in that it raises new issues not addressed in [their] initial brief."). The district court did not abuse its discretion or otherwise commit error by following the court's local rule prohibiting new arguments submitted in a reply brief. Because the defendant's probable cause argument was not properly raised in the district court, we decline to consider it

on appeal. *See Aaron v. Target Corp.*, 357 F.3d 768, 779 (8th Cir. 2004) ("Arguments and issues raised for the first time on appeal are generally not considered, and no good reason has been advanced to depart from that rule.").

D. Sovereign Immunity

Defendants next assert the district court erred when it waived sovereign immunity for Hrvol, Richter and Wilber, arguing they are shielded by the Iowa Tort Claims Act (ITCA), Iowa Code § 669 *et seq.*, and/or the Iowa Municipal Tort Claims Act (IMTCA), Iowa Code § 670 *et seq.* Under the doctrine of sovereign immunity a tort claim against a state employee, acting within the scope of his office or employment with the state, must be brought pursuant to the ITCA. See Iowa Code § 669.2(3)-(4).

The State of Iowa (Iowa) possesses sovereign immunity. *See Doe*, 345 F.3d at 597 (stating the Eleventh Amendment provides states with immunity from suits). As such, Iowa and its employees can only be sued to the extent Iowa expressly waives its immunity. *Id.* The ITCA is a statutorily defined waiver of sovereign immunity allowing certain claims to be filed against Iowa which fit within the ITCA's specified reach, and which do not fall within explicit exceptions where Iowa expressly retained its sovereign immunity.

1. Hrvol and Richter

Hrvol and Richter challenge the district court's denial of their summary judgment motion on the state law claims based on sovereign immunity. Harrington asserted a claim of intentional infliction of emotional distress and a claim for loss of parental consortium, on behalf of his daughter, against Hrvol

and Richter. McGhee asserted claims of false arrest and imprisonment and intentional infliction of emotional distress against Hrvol and Richter. Harrington and McGhee base their claims on allegations Hrvol and Richter arrested them without probable cause, coerced and coached witnesses, fabricated evidence against them, and concealed exculpatory evidence. Both Harrington and McGhee contend Hrvol and Richter were acting within the scope of their employment at all times relevant to the complaint.

Having concluded Hrvol and Richter could be considered state employees under the ITCA, the district court found they were entitled to sovereign immunity to the extent Harrington's and McGhee's claims were premised on allegations Hrvol and Richter concealed exculpatory evidence. The district court reasoned these actions were taken within the scope of Hrvol's and Richter's prosecutorial duties. However, the district court found Hrvol and Richter were not entitled to sovereign immunity to the extent the state law claims were premised on allegations Hrvol and Richter arrested Harrington and McGhee without probable cause, coerced and coached witnesses, and fabricated evidence. The district court, relying on its analysis of absolute immunity, concluded that, because these "investigatory actions" were taken before filing the True Information, the investigatory actions "could arguably be deemed to have been taken outside the 'scope of their employment' as prosecutors of state criminal violations."

Hrvol and Richter argue the district court erred in failing to conduct an analysis of the scope of their employment for sovereign immunity purposes distinct from the court's analysis of whether Hrvol and

Richter were entitled to absolute immunity. We agree.

To determine whether Hrvol and Richter are entitled to sovereign immunity for the actions they took before filing the True Information, the district court should have looked to the duties of county attorneys as they existed in 1977 and 1978, and to the provisions of the ITCA. The ITCA applies to:

> Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state *while acting within the scope of the employee's office or employment.*

Iowa Code § 669.2(3)(b) (emphasis added). "'Acting within the scope of the employee's office or employment' means acting in the employee's line of duty as an employee of the state." Iowa Code § 669.2(1).

Among the duties of a county attorney were the duties to:

1. Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted in the name of the state of Iowa, or by him as county attorney, except as otherwise specially provided.

. . . .

6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party.

. . . .

11. Perform other duties enjoined upon him by law.

Iowa Code § 336.2(1), (6) & (11) (1977). In separate subsections, the Iowa Code distinguishes between the duty to "prosecute" an action and the duty to "enforce" the laws of the state of Iowa, the "violation of which **may** be . . . prosecuted." Iowa Code § 336.2(1) (1977) (emphasis added). Thus, to "enforce" necessarily must mean something other than to "prosecute." According to *Black's Law Dictionary* 569 (8th ed. 2004), the term "enforce" means "[t]o give force or effect to (a law, etc.)" or "to compel obedience to." The Iowa Code also broadly expands the county attorney's duties to include "[p]erform[ing] other duties enjoined upon him by law." Iowa Code § 336.2(11) (1977). We conclude the official duties of a county attorney included more than the mere prosecution of an action.

If Hrvol and Richter were acting within the scope of their office or employment during the investigation, the court must consider whether Iowa has waived sovereign immunity for the state law claims asserted against them. The ITCA does not apply to, thus the state retains sovereign immunity for, "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Iowa Code § 669.14(4). *See Trobaugh v. Sondag*, 668 N.W.2d 577, 584 (Iowa 2003) (stating § 669.14(4) "describe[s] the categories of claims for which the State has not waived its sovereign immunity"). A plaintiff may not assert a claim against the state when "[t]he gravamen of [the] plaintiff's claim . . . is the functional equivalent" of a claim listed in § 669.14(4).

Greene v. Friend of Court, Polk County, 406 N.W.2d 433, 436 (Iowa 1987) (referring to Iowa Code § 25A.14(4), which was the prior version of § 669.14(4), and explaining § 669.14(4) "identifies excluded claims in terms of the type of wrong inflicted").

If Hrvol and Richter were acting within the scope of their office or employment, the ITCA explicitly bars McGhee from asserting claims of false imprisonment and false arrest against them. Iowa Code § 669.14(4). McGhee's and Harrington's claims for intentional infliction of emotional distress and Harrington's claim for loss of parental consortium are premised on allegations Hrvol and Richter arrested them without probable cause, coerced and coached witnesses, and fabricated evidence. The gravamen of these claims arises out of false imprisonment, false arrest, abuse of process and deceit.

We decline to decide whether Hrvol and Richter were acting within the scope of their duties as county attorneys when they took "investigatory actions" before filing the True Information. Instead, we reverse the district court's denial of sovereign immunity and remand this matter to the district court for further development of the record and analysis consistent with this opinion.

2. Wilber

Wilber appeals the denial of his summary judgment motion on McGhee's defamation claim based on Wilber's sovereign immunity and qualified immunity defenses under the ITCA, an argument Wilber did not make to the district court where he relied instead upon the protections afforded by the IMTCA. The district court held the IMTCA's protection only ap-

plied if Wilber's comments were "a judgment call driven by social, economic or political concerns" and found they were not.

The ITCA defines a state employee, for purposes of the act, as including any "persons acting on behalf of the state . . . in any official capacity, temporarily or permanently in the service of the state of Iowa." Iowa Code § 669.2(4). Thus, for purposes of the ITCA, Wilber is a state employee when acting in his official capacity as County Attorney. We find no language within the ITCA which would restrict Wilber's immunity under the ITCA solely to prosecutorial acts. Instead, the only restriction is for acts taken in an official capacity. *See Id.* Clearly, when Wilber held his press conference and issued his written press release he was acting in his official capacity as County Attorney discussing prosecutions by the state.

McGhee's defamation claim is governed by the ITCA which explicitly bars a claim for defamation arising out of libel or slander. *See* Iowa Code § 669.14(4). Therefore, the district court erred as a matter of law in denying Wilber's motion for summary judgment as to McGhee's defamation claim. This claim must be dismissed.

E. Constitutional Violation

Hrvol and Richter assert the district court erred in determining their acts of obtaining, manufacturing, coercing and fabricating evidence before the filing of the True Information constituted a constitutional violation justifying the denial of qualified immunity. Hrvol and Richter assert it is only the use of this evidence, not its procurement, that constitutes a violation of McGhee's and Harrington's substantive

due process rights. Further, as the district court held, Hrvol and Richter have absolute immunity for their use of this evidence at trial. Thus, Hrvol and Richter alternatively admit they violated McGhee's and Harrington's right to substantive due process, but assert the violation was not in procuring, but only in using the evidence at trial, an act for which they have absolute immunity.

The district court held the procurement or fabrication of the evidence constituted a due process violation, noting this court has held a person's due process rights are violated when police officers use falsified evidence to procure a conviction, *see Wilson v. Lawrence*, 260 F.3d 946, 954-55 (8th Cir. 2001), stating "it would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty." *McGhee v. Pottawattamie County*, 475 F. Supp. 2d 862, 907 (S.D. Iowa 2007).

The district court's decision is in accord with the Second Circuit Court of Appeals which held "the right at issue is a constitutional right, provided that the deprivation of liberty . . . can be shown to be the result of [the prosecutor's] fabrication of evidence" where the prosecutor was accused of both fabricating evidence and then using the fabricated evidence at trial. *Zahrey v. Coffey*, 221 F.3d 342, 344, 349 (2d Cir. 2000). The district court acknowledged that the Second Circuit noted its decision was "in tension, if not conflict, with the majority opinion by Judge

Easterbrook for the Seventh Circuit in *Buckley IV*,[6] on remand from the Supreme Court," but the Second Circuit concluded it was unclear if *Buckley I*[7] was decided on this basis or on the distinguishable basis of causation. *Zahrey*, 221 F.3d at 354-55. Even if there is some tension, there is agreement "[i]mmunity is absolute only when the prosecutor performs distinctively prosecutorial functions." *Buckley I*, 919 F.2d at 1240.

We find immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not "a distinctly prosecutorial function." The district court was correct in denying qualified immunity to Hrvol and Richter for their acts before the filing of formal charges.

III. CONCLUSION

We reverse the decision of the district court as to McGhee's defamation claim against Wilber, because Wilber is entitled to sovereign immunity under the ITCA for those alleged actions. We also reverse and remand the decision of the district court denying sovereign immunity to Hrvol and Richter on Harrington's and McGhee's state law claims premised on Hrvol's and Richter's investigatory actions taken before filing the True Information. We remand this issue to the district court for further development of

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[6] *Buckley IV* refers to *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994).

[7] *Buckley I* refers to *Buckley v. Fitzsimmons*, 919 F.2d 1230 (7th Cir. 1990).

the record and analysis consistent with this opinion. We affirm the district court in all other respects.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

4:05-cv-00255

Curtis W. McGhee, Jr., *Plaintiff*,

v.

Pottawattamie County, Iowa; The City of Council Bluffs, Iowa; Joseph Hrvol; David Richter; Matthew Wilber; Daniel Larsen; Lyle Brown; and David Dawson, *Defendants*

ORDER

4:05-cv-00178

Terry Harrington, individually and in his capacity as the father of Nicole Antoinette Harrington, *Plaintiff*,

v.

County of Pottawattamie, Iowa; City of Council Bluffs, Iowa; David Richter, in his individual and official capacities; Joseph Hrvol, in his individual and official capacities; Daniel C. Larsen, in his individual and official capacities; Lyle W. Brown, in his individual and official capacities; and John Does One Through Nine, in their individual and official capacities, *Defendants*.

[February 23, 2007]

MEMORANDUM ORDER AND OPINION

On March 25, 2005, Plaintiff Terry Harrington ("Harrington"), individually and in his capacity as the father of Nicole Antoinette Harrington, filed a Complaint and Jury Demand (Clerk's No. 1) against Pottawattamie County, the City of Council Bluffs, David Richter ("Richter"), Joseph Hrvol ("Hrvol"), Daniel Larsen ("Larsen"), Lyle Brown ("Brown"), and various John Does, alleging the following claims: 1) Fabricated and Perjured Testimony—§ 1983 Civil Rights Violations; 2) Withheld Evidence—*Brady* and *Giglio* Violations; 3) Conspiracy under the Color of State Law to Deny Constitutional Rights; 4) State Claim—Intentional Infliction of Emotional Distress; 5) State Claim—Malicious Prosecution; and 6) State Claim—Loss of Parental Consortium. Harrington Clerk's No. 1. On May 4, 2005, Plaintiff Curtis W. McGhee, Jr. ("McGhee"), filed a similar action against Pottawattamie County, Council Bluffs, Hrvol, Richter, Matthew Wilber ("Wilber"), Larsen, Brown, and David Dawson ("Dawson"), alleging thirty-two counts, including § 1983 violations; Malicious Prosecution; False Arrest and Imprisonment; Intentional Infliction of Emotional Distress; Conspiracy; Unconstitutional Customs and Policies; and Defamation. McGhee Clerk's No. 1.

On October 10, 2006, having previously consolidated both of the above-captioned cases, along with a defamation case filed by Harrington, for purposes of discovery, United States Chief Magistrate Judge Thomas Shields ordered the trials of both cases consolidated. The Magistrate Judge ordered that McGhee's defamation claim be consolidated with Harrington's defamation and slander claims made in Case No. 4:03-cv-90616, and that trial on those mat-

ters should be bifurcated from the trial on Harrington and McGhee's various constitutional and other state law claims. *See* McGhee Clerk's No. 103; Harrington Clerk's No. 97 (Order Consolidating Cases for Trial) ("[T]he underlying facts and the common thread throughout the testimony of all liability witnesses who will testify is essentially the same.").

Currently pending before the Court are several motions, including Motions for Summary Judgment, filed by Defendants Pottawattamie County, Hrvol, Richter, and Wilber, in each of the above-captioned actions (McGhee Clerk's No. 95; Harrington Clerk's No. 93); a Motion for Partial Judgment on the Pleadings, filed by Defendants Larsen, Brown and the City of Council Bluffs in the Harrington case (Clerk's No. 90); a Motion for Judgment on the Pleadings, filed by Defendants Dawson and the City of Council Bluffs in the McGhee case (Clerk's No. 99); and a Motion for Judgment as a Matter of Law, filed by Defendants Larsen, Brown, and the City of Council Bluffs in the McGhee case (Clerk's No. 100). Each Plaintiff has resisted the respective motion and the matters are fully submitted. In light of the fact that both cases arise from fundamentally the same factual backgrounds, and in light of the fact similar arguments are raised in each of the motions, the Court finds it prudent to deal with all pending motions in one order.

Additionally pending before the Court is McGhee's Motion for Leave to File Surreply Brief on County and Prosecutors' Motion for Summary Judgment (Clerk's No. 133). Defendants filed a resistance to the Motion and a Request to Strike the Surreply accompanying it (Clerk's No. 137). Defendants argue that the Surreply is redundant and merely continues

arguing points raised in McGhee's resistance. While admittedly the Local Rules do not provide for the filing of a surreply, they also do not prohibit the consideration of a surreply in the Court's discretion. Having reviewed the surreply, filed in response to Defendants' Reply Brief, the Court finds that consideration of the document will aid the Court in resolution of the pending Motions for Summary Judgment. Accordingly, McGhee's Motion for leave to file the document is GRANTED.

I. FACTUAL BACKGROUND[1]

On approximately July 5, 1977, Captain John Schweer ("Schweer") retired from the Council Bluffs, Iowa Police Department. On or about July 12, 1977, Schweer went to work as a night security guard for three car dealerships in Council Bluffs: McIntyre Oldsmobile; Bluffs Toyota; and O'Neill Datsun.[2] At around 9:30 a.m. on Friday, July 22, 1977, Schweer's body was found on the railroad tracks near O'Neill Datsun. Schweer had died of a 12-gauge shotgun wound to the right chest. A lone 12-gauge shotgun shell was found on the premises of McIntyre Oldsmobile. The shell was a green Remington paper shotgun shell containing size #4 shot, the same size pellets found in Schweer's body. Additionally, the live shell found at McIntyre Oldsmobile had paper wadding, a component that Remington stopped using

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[1] The Defendants, with very few exceptions, do not resist the facts as set forth in the Plaintiffs' Complaints for purposes of the pending motions.

[2] According to the Complaints, the three dealerships had common ownership and were located near the intersection of 32nd Avenue and South 11th Street in Council Bluffs, Iowa.

in approximately 1966, and similar to that found at the murder scene.

Defendants Brown and Larsen, detectives with the Council Bluffs police department at the time of the murder, were assigned as lead investigators on the Schweer murder. County Attorney Richter and Assistant County Attorney Hrvol worked closely with Brown, Larsen, and the Council Bluffs Police Department during the investigation, and both participated in witness interviews prior to any arrests being made in the case.[3]

Early in the Schweer investigation, Defendants learned that, on or about July 20, 1977, Schweer had written a note to McIntyre Oldsmobile employee David Edwards, stating that he had witnessed a man trying to get into one of the trucks on the lot the night before. When Schweer approached the man, the man ran away. Schweer recommended that flood lights be placed in that portion of the dealership lot. Additionally, Defendants learned that Schweer had a conversation with Council Bluffs Police Officer Ron Cady in the early morning hours of July 21, 1977. Schweer told Cady that he had seen a man carrying what he thought was a rifle or a car jack at O'Neill Datsun, and that he believed the man and his dog were still in the area.

Plaster casts of footprints and dog prints were taken in the area around Schweer's body following the murder. On July 23, 1977, Council Bluffs Police Officer Richard Moore reported that he and Officer O.G. Chapin had found shoe and dog prints west of

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[3] Throughout this Memorandum Order and Opinion, the Court will, where appropriate, refer to Richter, Hrvol, Larsen, and Brown as the "1977 Defendants."

the area where Schweer's body was found that were of the same type and shape as those found at the crime scene. Moore also noted that a fit person could get from the murder scene and completely across the nearby I-29 interstate in four minutes.

On July 25, 1977, Brown wrote a report of an interview with James Burke ("Burke"), an employee at the Northwestern Bell office located due west of where Schweer's body was found. Brown reported that Burke told police that he had seen a man of average build running in a westerly direction between the Northwestern Bell building and I-29 on July 19, 1977, at about 11:30 p.m. According to Burke, the man was wearing overalls, and had a shotgun and a dog with him. Burke also reported that Schweer drove up to him that same evening and asked if he had seen a man running in the area. A July 28, 1977 report by Council Bluffs Police Sergeant Larry Williams states that when Williams and Richter reinterviewed Burke, they obtained substantially the same information as Brown had reported.

When Larsen heard that a man with a dog had been seen in the area of Schweer's murder, he thought of Charles Richard Gates ("Gates"). Gates was a white male, aged approximately 47, whose sister, Marcella Oamek was married to a Captain on the Council Bluffs Fire Department. Gates was known to carry a shotgun while walking his dogs. Council Bluffs police picked up Gates and photographed him. A police report states that Gates was questioned by Council Bluffs police officers a few days after the murder, but there is no report detailing that interview.

A July 28, 1977, police report reflects that Council Bluffs police, along with Richter, interviewed

David Waide ("Waide"), who worked in the area of the murder. Waide was shown a photograph of Gates and positively identified him as the man Waide saw walking his dogs in the area. Waide had last seen Gates on July 19, 1977. Another report of the same date reflects that Council Bluffs Police Officer L.L. Diamond and Hrvol canvassed the neighborhood near the scene of the murder. One Mrs. Shea told them that she had seen a man in overalls and a hat walking dogs. The report states that Mrs. Shea gave a "perfect description of Gates, a previous suspect in [the] case." Information obtained from Mrs. Akins, another neighborhood resident, "concur[red] exactly" with Mrs. Shea's information, though Mrs. Akins had seen the individual as recently as July 22, 1977.

Larsen did a background check on Gates and wrote a report of his findings on August 12, 1977. According to the report, Gates' neighbors described him as a "spooky type individual" who constantly walked his three dogs and was "strictly a loner." Larsen reported that Gates drove a white car painted to look like a police vehicle that had a set of "top lights consisting of backup or turn signal type lights made for larger type trucks" which gave the appearance of lights on a police car. Larsen additionally reported that Gates had been a suspect in the 1963 homicide of a female co-worker at a printing company in Omaha. Larsen wrote in his report that Gates had been given a polygraph and that the tester opined that Gates was not truthful in his denials of owning a shotgun or having shot Schweer. Larsen's report recommended further investigation of Gates. According to the Complaints, there is no documentation anywhere in the Schweer murder file indicating that Gates' home was searched, that footprint com-

parisons were made, or indicating why Gates was ultimately eliminated as a suspect.[4] Regardless, at some point the investigation began to focus on a "car theft ring," rather than on Gates.

On September 1, 1977, two cars were stolen in Fremont, Nebraska: a 1977 Cadillac ("Cadillac") from Sid Dillon Oldsmobile and a 1976 Lincoln ("Lincoln") from Diers Ford. The suspects in the thefts were three black youths driving a black Oldsmobile Cutlass Supreme with Douglas County, Nebraska, license plates. Police believed that the thieves visited the dealerships during business hours, took the keys for the cars and replaced them with "dummy" keys, and then returned after hours to steal the cars (referred to hereinafter as a "key-switch scheme"). The thefts were reported by the Nebraska State Patrol to the Council Bluffs Police on September 5, 1977. Larsen checked the Council Bluffs Police records and found that a Black Oldsmobile Cutlass ("black Cutlass") had been reported stolen from Bluffs Toyota shortly before Schweer started working as a night watchman. Also on September 5, 1977, the Lincoln was discovered abandoned in Omaha, but a t-shirt had been left in the vehicle with "Contact Band" written on the front and "Jones" on the back. On September 9, 1977, Lincoln Nebraska police stopped three black teenagers—Kevin Mack (age 16), Roderick Jones (age 17), and Candice Pride (age 16)—in the stolen Cadillac. Jones admitted that the

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[4] Plaintiffs also allege that in the early stages of the investigation of Schweer's murder, more than a dozen suspects other than Harrington and McGhee were considered. Further, with regard to Gates, Richter and Hrvol, in conjunction with the police, consulted an astrologer to prepare astrological charts on Gates.

t-shirt that had been found in the abandoned Lincoln was his t-shirt.

Kevin Mack, a/k/a Kevin Hughes (hereinafter "Hughes") had a long criminal record, but denied that he stole the Cadillac he was found driving. He told Fremont, Nebraska police that three other individuals—Terry Harrington, Anthony Houston, and "Cub" (later identified as Curtis McGhee) had stolen the cars from Fremont, as well as the black Cutlass from Council Bluffs and another Lincoln from a dealership in Omaha. Hughes told police that Houston had given him permission to drive the Cadillac, and that the other set of keys found in the Cadillac belonged to the real car thieves.

After being notified by Nebraska authorities that Hughes might have information on the Schweer murder, Larsen and Brown traveled to Lincoln to interview Hughes. According to the Complaints, Hughes was told that police knew he was involved in the car theft ring, and that police knew that he and his fellow car thieves were responsible for Schweer's murder. Hughes was purportedly told that he would not be charged with murder if he gave authorities someone else, and that there was a $5,000.00 reward for information leading to the arrest and conviction of Schweer's murderer or murderers. Additionally, Hughes was told that authorities would help him with numerous pending charges if Hughes helped them on the Schweer case.

Hughes first told Larsen and Brown in a written statement that he saw an individual named Dennis Jackson and a "light-skinned man" (later identified as Steven Frazier) at a car wash in Omaha. Hughes stated that Frazier told him he had stolen his Lincoln Continental from McIntyre Oldsmobile and had

killed a security guard to get it. As no Lincoln was stolen from McIntyre Oldsmobile on the night of the murder, Larsen and Brown told Hughes they knew he was lying. At some point in time, Hughes also told investigators that Arnold Kelly was involved in the Schweer murder. Subsequent police investigation, however, revealed that Kelly was in the Kansas City Job Corp at the time and could not have been involved in Schweer's murder.

According to the Complaints, the Defendants began pressuring Hughes to implicate Harrington, McGhee, and Houston (the same individuals Hughes accused of various car thefts) in the Schweer murder. Hughes initially told investigators that he did not think the three were capable of murder, but he eventually told authorities that while he was not personally involved, Harrington and others told him that they had killed Schweer. When authorities accused Hughes of lying, Hughes admitted that he was lying.

On September 30, 1977, Hughes next told police that he was present on the night of the murder. He was brought to Council Bluffs to meet with the 1977 Defendants at the scene of the murder. The Complaints allege that, although authorities knew that Hughes was a liar, they nonetheless "worked with" him to create a case against Harrington and McGhee by editing Hughes' story to eliminate those items that could be proved false and by providing Hughes with more details of the crime to make his story more credible. Indeed, the Complaints allege that in his September 30, 1977 statement, Hughes claimed to have gone to McIntyre Oldsmobile on the night of the murder with Houston, but ultimately dropped Houston from his story after Defendants told Hughes that Houston was in jail on the night of the murder

and could not have been present at the Schweer murder.

Hughes' story in 1977 also changed in other ways. He first claimed that Schweer was killed with a pistol, but later said the murder weapon was a 20-gauge pump shotgun. Accordingly to the Complaints, Defendants told Hughes that a 12-gauge shotgun shell was found near a Toronado parked in front of the new-car showroom at McIntyre Oldsmobile, and Hughes then changed his story to say a 12-gauge shotgun was used to murder Schweer, and that the plan was to steal the Toronado that evening. Ultimately, Hughes claimed that he, Harrington, and McGhee drove around the three Council Bluffs car dealerships the night of the murder. They parked Harrington's green 1970 Oldsmobile 98, and Harrington, who had the keys to the Toronado, retrieved a shotgun from the trunk, wrapped it in a tan leather jacket, and proceeded to walk from his vehicle to the Toronado, along with McGhee. Hughes stated that he sat in the backseat of Harrington's car listening to music and smoking cigarettes. Hughes claimed that he heard a shot and then saw Harrington, McGhee and Houston (though Hughes later omitted Houston from the scenario) come running back to the car from behind McIntyre Oldsmobile. At some point, Hughes changed his story to more aptly reflect the fact that Schweer's body was found closer to O'Neill Datsun. Though Schweer's Toyota Land Cruiser was found near his body with the lights on and the door open, Hughes never mentioned seeing or hearing Schweer or his vehicle, nor did Hughes ever state that Harrington or McGhee told him that Schweer had come upon them during their attempt to steal the Toronado.

Hughes also stated in his September 30, 1977 statement that Harrington wrapped a tan leather jacket around the gun before going to steal the Toronado. In an October 1977 search of Harrington's mother's home, authorities seized a reddish-maroon vinyl jacket, which was later given to the Iowa Bureau of Investigation to be tested for gunpowder residue. Michael Petersen, the Iowa Bureau of Investigation technician who examined the jacket, found no evidence that Harrington's jacket had been wrapped around a shotgun at the time of its firing. Petersen did, however, state that two particles of debris from the surface of the jacket were unburned, smokeless gunpowder. The particles were destroyed by the testing and thus were not subject to independent testing by either Harrington or McGhee. Petersen did not match the particles to the gunpowder found in the shotgun shell found at McIntyre Oldsmobile after the murder, or with gunpowder found on the victim. There was also no attempt to rule out the possibility that the particles could have come from a .410 shotgun owned by Harrington and retrieved during the search.

Plaintiffs claim that Defendants then undertook a scheme to coerce other "witnesses" into corroborating Hughes' story. While Hughes initially told authorities that he was watching television with Pride on the night of the murder, he later stated that McGhee and Harrington picked him up in Omaha before the murder. Eventually, Hughes stated that others, including Candice Pride and another individual named Clyde Jacobs, were present when Harrington and McGhee picked Hughes up in Omaha. Hughes also initially stated that Harrington and McGhee picked him up at around 11:00 p.m. Harrington's high school football coach, however, had

seen him at an Ohio Players concert in Omaha at approximately that time. Hughes later stated that Harrington and McGhee picked him up around midnight, rather than at 11:00 p.m.[5]

On October 17, 1977, Larsen wrote a report indicating that Roderick Jones had admitted being with Hughes on several occasions when the key-switch scheme was used to steal cars from dealerships. According to the Complaints, Brown told Jones that they knew McGhee, Harrington, and Hughes had killed Schweer and that Jones should say he saw them together on the night of the murder or risk being charged with auto theft and murder. In a taped statement made after being placed in a room with Hughes, Jones said that everything he knew came from Hughes, and that he was with Hughes and Clyde Jacobs when Harrington and McGhee picked up Hughes on the night of the murder. Later at the trials, Jones stated that Pride was also present when Harrington and McGhee picked up Hughes. Though Jones' taped statement indicated that McGhee and Harrington picked up Hughes in the late part of July, he testified at McGhee's trial that it was sometime in the middle of July, and testified at Harrington's trial that it was the evening of July 21, 1977. Likewise, Jones' taped statement indicated that Hughes was picked up around 11:30 p.m., but at McGhee's 1978 trial he claimed it was around 11:00 p.m. or midnight, and at Harrington's trial he said that he was at the same Ohio Players concert as

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[5] Hughes testified at Harrington's trial that Hrvol told him about Harrington's alibi defense and emphasized that time was important.

Harrington and saw Harrington and McGhee pick Hughes up around midnight or 12:30 a.m.

Clyde Jacobs was brought to Council Bluffs numerous times by Larsen, Brown and Hrvol for questioning, sometimes with Jones and Pride. Jacobs originally stated that Harrington and "another colored guy" picked up Hughes, but testified at McGhee's trial that Harrington and McGhee picked Hughes up at "12 something." At Harrington's trial, Jacobs stated that Harrington and McGhee picked up Hughes at "11 something" and also stated that he had been at the same Ohio Players concert as Harrington.

Candice Pride was dating Hughes in the fall of 1977. According to the Complaints, Pride was told that her boyfriend, Hughes, would be charged with murder if she did not corroborate his story about being picked up by Harrington and McGhee on the night of the murder. On October 12, 1977, Pride signed a statement indicating that in the latter weeks of July 1977, she, Jones, Hughes and others were together in a parking lot when Harrington and McGhee picked up Hughes at around 10:45 p.m. In an April 1978 statement to McGhee's lawyer, however, Pride stated that she didn't think she was in Omaha in July 1977, that she was not involved with Hughes at that time, and that she did not see Harrington and McGhee pick up Hughes. At the McGhee trial, however, Pride testified consistent with her October 12, 1977 statement, though she stated that Hughes was picked up at 11:00 or 11:30 p.m. At Harrington's trial, Pride testified that Hughes was picked up around midnight.

According to the Complaints, Hughes claimed that he had Harrington and McGhee drop him off at

his girlfriend, Linda Lee's house in Omaha after the murder. Hughes claimed that he arrived at Lee's house at around 1:30 a.m. and that Lee saw Harrington's car leave. Lee was interviewed by Larsen and Brown in October 1977, and she signed a statement indicating that Hughes came to her house after midnight one evening in the latter part of July, and that she saw Harrington and another black male in Harrington's car that night. At McGhee's trial, Lee was unable to say during what part of July she saw Hughes and whether it was before or after 1:00 a.m. At Harrington's trial, Lee testified that Hughes came over after midnight twice on the same night in July 1977. The first time was after midnight, and the second time was around 2:00 a.m.

Within a few days after Schweer's murder, two workers at Transley Trucking, a business around 200 yards from where Schweer's body was found, informed authorities that they had heard a loud noise like a firecracker between 3:00 and 3:30 a.m. on July 22, 1977. The medical examiner's report placed the time of Schweer's death at around 4:00 a.m. The pathologist who performed Schweer's autopsy testified that Schweer died approximately fifteen minutes to one hour after being shot, and that it was "very possible" that Schweer died close to 4:00 a.m.

On November 16 (Harrington) and 17 (McGhee), 1977, preliminary informations, signed by Brown and approved by Hrvol and Richter, were filed charging McGhee and Harrington with Schweer's murder. McGhee and Harrington were each arrested the same day the respective informations were issued in Omaha and were extradited to Pottawattamie County, Iowa, on or about December 22, 1977. The cases were transferred to juvenile court on or about

December 23, 1977, but were referred back to the County Attorney's office on or about January 20, 1978. On February 17, 1978, a True Information was filed formally charging McGhee and Harrington with first degree murder. The evidence implicating McGhee and Harrington listed in the True Information was the Minutes of Testimony containing Hughes' story.

Plaintiffs allege that, due to credibility concerns about Hughes, the 1977 Defendants concealed at least eight Council Bluffs Police Department reports from Plaintiffs to deprive them of material, exculpatory evidence.[6] Specifically, Plaintiffs claim that the two reports related to James Burke seeing a man with a dog and shotgun were concealed; that David Waide's identification of Gates was concealed; that Larsen's background report on Gates was concealed; that a report of the County Attorney's Office's consultation with an astrologer about Gates was concealed; that the report referencing Schweer's note suggesting the installation of floodlights was concealed; and that a report in which Officer Kremer reported that Gates had been interviewed shortly after the murder was concealed.

After arresting and filing True Informations against the Plaintiffs for the murder of Schweer, the 1977 Defendants sought out prisoners who were in jail with McGhee to falsely testify against him. Ken

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[6] It is noteworthy that police procedure required that all police reports from the Schweer homicide be given to the County Attorney's Office. Indeed, Plaintiffs allege repeatedly that the prosecutors, Richter and Hrvol, were at all times aware of the various exculpatory information that was not disclosed to them during their criminal cases.

Freeman was allegedly promised that he would not have to go back to the Anamosa prison if he agreed to testify against McGhee, but refused. Tyrone Pierce, an eighteen year old charged with burglary and car theft, was allegedly offered reduced charges for testimony against McGhee. After he was placed in a cell adjacent to McGhee's, Pierce stated that McGhee admitted to killing Schweer. Pierce's own charges were ultimately dropped. Larry Plater, a jail inmate awaiting transfer to a reformatory, claimed that McGhee told him a few days after the murder that he had been present when Harrington killed a police officer. Plater purportedly gave this testimony in exchange for a promise not to go to the reformatory. Eric Hartwell, an eighteen year old inmate serving a ten-year sentence at the Anamosa prison, contacted Larsen and Hrvol and told them that McGhee had told him that Harrington and another unnamed individual had gotten a 12-gauge shotgun out of the trunk, wrapped it in a jacket, and shot the "sheriff" twice. Hartwell admitted that when incarcerated near McGhee, McGhee had a copy of the True Information which alleged this information, but Hartwell denied looking at it. Hartwell testified at McGhee's trial that the information about an unknown individual was a "typo." Hartwell's sentence was subsequently reduced. Plaintiffs claim that Defendants did not tell them about any of the "deals" they had with jailhouse informants.

On June 13, 1978, McGhee was convicted for the first-degree murder of John Schweer and sentenced to life imprisonment without parole. Harrington was convicted of the same crime and received the same sentence on August 4, 1978. According to the Complaints, Brown testified at Harrington's 1978 trial, and at Harrington's 1987 post-conviction review pro-

ceedings, that there were no early alternative suspects in Schweer's murder. He did not indicate that Charles Gates was ever a suspect. At the depositions of Richter, Hrvol, Larsen, and Brown related to Harrington's 1987 proceedings, each denied the existence of alternative suspects. James Cleary, Harrington's attorney, testified in 2000 that, after making a global discovery request, he received documents, but none contained Gates' name or indicated that Gates was a viable suspect. McGhee's attorney in his 1987 post-conviction proceeding also claimed that he requested all files relating to Schweer's murder from the Pottawattamie County Attorney's Office, but that nothing in those materials mentioned Gates as a viable suspect. In McGhee's first post-conviction review in 1987, McGhee served an interrogatory requesting the "names and addresses of all suspects in the case." The answer was that no one "other than the plaintiff" was a suspect. Likewise, McGhee served an interrogatory asking "[w]hat the result of the investigation of the report of a man and a dog seen in the vicinity of McIntyre Oldsmobile a night or two before John Schweer's death?" The response to the interrogatory was that the "man and dog" was "never found or identified." In 1987, McGhee also served an interrogatory requesting information about "witnesses used at trial who were promised leniency in exchange for their testimony against Curtis McGhee, and the specific promises made to each." The reply was "[n]one." Hrvol assisted in answering the interrogatories.

In 1999, Anne Danaher, an employee of the Iowa prison where Harrington was incarcerated, got to know Harrington and his family. She requested the Council Bluffs Police Department file concerning Schweer's murder. The withheld reports regarding

Charles Gates were in the materials provided to her. Harrington brought a new post-conviction relief petition based in part on the fact that these reports had been withheld at trial. The Iowa district court denied Harrington's petition, but the Iowa Supreme Court reversed, finding that the Gates reports were withheld from Harrington in 1978, and that they were exculpatory in that they showed an alternative suspect for the murder. In its opinion, the Iowa Supreme Court stated that Hughes was "by all accounts a liar and a perjurer" and that admission of the Gates reports reasonably could have caused the jury to disregard or at least doubt Hughes' account of the murder. The court found that Harrington's due process rights were violated for the failure of the prosecution to turn over exculpatory evidence, vacated his conviction for first degree murder, and granted Harrington a new trial.

At the time of the Iowa Supreme Court's reversal of Harrington's conviction, Matthew Wilber was the Pottawattamie County Attorney, and had been for just under two months. Wilber had to determine whether to retry Harrington, and whether to oppose McGhee's petition for new trial based on the Iowa Supreme Court's decision in Harrington's case. Council Bluffs Police Detective David Dawson was assigned to work full-time on the case with Wilber, at Wilber's request. Wilber claims to have spent hundreds of hours working on the case after the Supreme Court's decision. Wilber found that the only person who placed Harrington or McGhee at the murder scene was Hughes, who had admitted in a 2000 deposition that his testimony against Harrington and McGhee was false. Likewise, Jones, Jacobs, Pride, and Lee had all recanted their stories, and Wilber found the jailhouse informants to be not

credible. Wilber also claims that he believed that the murder occurred between 3:00 and 4:00 a.m., and that Hughes' time line was inconsistent with that determination.

According to the Complaints, Wilber wanted to vindicate the law enforcement agencies involved in the prosecution of McGhee and Harrington by reconvicting both for Schweer's murder. Hughes, who had recanted in 2000, was living in Omaha at the time. Wilber instituted proceedings to have Hughes arrested as a material witness, and Hughes was arrested on April 21, 2003, and was transferred to Pottawattamie County on April 23, 2003. On April 24, 2003, Hughes was interviewed by Dawson. Hughes was not Mirandized and feared that he would lose his job if he did not return to it soon. To obtain his release from custody, he told Dawson that he had lied in 2000 at Harrington's post-conviction relief hearing when he said that his testimony at the 1978 trials was false. Wilber used this information to proceed with a criminal case against Harrington.

On June 2, 2003, Hughes was scheduled to be deposed regarding Harrington's retrial. The Complaints claim that Wilber undertook a plan to get Hughes to "take the Fifth" so that he could claim Hughes was "unavailable" as a witness and use Hughes' 1978 testimony at any retrial. Wilber spoke to Hughes before Harrington's counsel arrived for the deposition and told Hughes that he may have a right to an attorney, because if he lied under oath in 2000, he could be charged with perjury. Hughes told Wilber he wanted a lawyer and left before Harrington's attorney arrived. McGhee was not represented by counsel that day, and his attorney for his post-conviction proceedings was never informed of what

Wilber said to Hughes. Greg Steensland was appointed to represent Hughes, and told Wilber that Hughes would "take the Fifth" unless he was offered immunity. Wilber declined to grant Hughes immunity and Hughes "took the Fifth" when he was deposed in Harrington's case on July 26, 2003. Wilber then argued in court that Hughes' 1978 testimony would be read at Harrington's retrial because Hughes was "unavailable."

Knowing that McGhee would likely be granted a retrial on the same basis as Harrington, Wilber told McGhee that he was prepared to retry him for Schweer's murder. Wilber allegedly misrepresented some facts and concealed other facts in his discussions with McGhee's attorney, a relatively inexperienced lawyer who had been represented on criminal charges by Wilber's former law partner, Richter. Wilber informed McGhee's attorney that he had a stronger case against McGhee than against Harrington, and would like to discuss the possibility of resolving McGhee's case if McGhee would testify against Harrington.[7] Wilber claimed that the "stronger evidence" against McGhee stemmed from McGhee's attempt to induce Joseph Rogers to falsify an alibi for him for the night of the murder.[8] Wilber

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[7] McGhee had testified at his own trial in 1978 that Harrington picked him up at his home, then picked up Hughes, and then dropped McGhee off at his girlfriends, and that these events could have taken place on the night of Schweer's murder.

[8] Apparently in 1977, Rogers had written on a calendar "me and Cub [McGhee] going to the show" on July 22, 1977. Schweer, however, was murdered in the early morning hours on that date. Rogers did not write anything for the evening of July 21, 1977.

also claimed that McGhee had admitted his involvement in Schweer's murder to several jailhouse informants, including Tyrone Pierce, Aaron Gibbs, Eric Hartwell, and Larry Plater. Wilber told McGhee's attorney that "[w]e have been able to locate, and speak to, each of these four individuals." Pierce, however, had recanted his story in a 1988 post-conviction proceeding by Harrington. In an April 2003 interview with Plater by Detective Dawson, Plater did not recall McGhee telling him he was with Harrington when Schweer was killed and later admitted that McGhee made no such statement. Aaron Gibbs never claimed McGhee admitted involvement in Schweer's murder. Wilber testified under oath that he did not believe Hartwell was a credible witness, but did not reveal this information to McGhee or his attorney. Wilber also told McGhee's attorney that the polygrapher who examined Gates in 1977 had been interviewed and said that "contrary to the information contained in Dan Larsen's [1977] police report, Gates actually passed his polygraph when questioned about his involvement in the shooting of John Schweer." The polygrapher, Selma Mendyk, did not make such a statement.

Wilber also told McGhee's attorney in a letter dated June 5, 2003, that "Gates has been effectively eliminated as a suspect at this point in time." Indeed, the Complaints allege that Dawson had gone to the Omaha Police Department and reviewed the 1963 murder file for which Gates had been a suspect. He discovered that a records check performed on Gates at that time indicated "'Safe Keeping' in connection with Assault with Gun (Mental) dated 6-22-55." Dawson also took a taped statement from Gates on April 25, 2003. During that interview, Gates admitted that he may have walked dogs in the area of

the murder. When asked where he was the night of the murder, Gates said, "that's deep," but didn't answer. Gates could not recall what he told police in 1977 about his whereabouts on the night of the murder.

On September 2, 2003, McGhee signed a letter agreement with Wilber and the Pottawattamie County Attorney's Office. It provided that McGhee would enter an *Alford* plea to second degree murder and be sentenced to 25 years with credit for time served. McGhee had already served nearly 26 years in prison for his conviction for the first-degree murder of Schweer. By entering an *Alford* plea, McGhee could maintain his innocence for Schweer's murder, but finally be released from custody. The plea agreement provided that McGhee would stipulate to the Minutes of Testimony set forth in the 1978 True Information against him. McGhee did not admit the truth of the Minutes of Testimony. As part of the plea agreement, McGhee also agreed to cooperate in the re-prosecution of Harrington. The Pottawattamie County Attorney's Office agreed that McGhee's sentence should be vacated on the same basis as Harrington's, and that he should be granted a new trial. It was expected that McGhee's plea would not be presented to a court until after Harrington's retrial, and Wilber retained the right to void the plea agreement if McGhee did not testify in accordance with the terms of the agreement. On the same date, Iowa District Court Judge Abel vacated McGhee's 1978 conviction, pursuant to the parties' agreement, and granted McGhee a new trial.

Also on September 2, 2003, following the signing of the letter agreement, McGhee gave a deposition in regards to Harrington's new trial. McGhee main-

tained his innocence during the deposition and stated he would take any deal just to get home. McGhee claimed that Harrington picked him up at his home the night of the murder, they picked up Hughes, and then Hughes and Harrington dropped McGhee off at his girlfriend's home. McGhee was released from custody after his deposition and payment of a $15,000 bond. He remained subject to electronic monitoring and pretrial release supervision.

On October 23, 2003, the judge in Harrington's retrial permitted Harrington's counsel to depose Hughes. Neither McGhee nor his attorney were in attendance, but Wilber was present. Hughes testified that he had lied in 1978 and that he had no knowledge of Harrington or McGhee being involved in the murder of Schweer. He stated that he would not testify as he did in 1978. Despite his knowledge that the Minutes of Testimony were based on Hughes' now recanted 1978 story, Wilber appeared at a plea hearing for McGhee on October 24, 2003. There, Wilber stated that the [1978] Minutes of Testimony were true and provable, and the judge accepted McGhee's *Alford* plea on that basis. Shortly after the plea was finished, Wilber issued a press release and gave a press conference announcing his decision to discontinue the prosecution of Terry Harrington for the murder of John Schweer. The press release read as follows:

> It is with regret that I am announcing my decision to discontinue the prosecution against Terry Harrington for the murder of John Schweer. Recent events have unfortunately made it impossible for us to proceed with the trial. As you are all undoubtedly aware, I am very limited on the information I

can convey outside of an official court document or proceeding. I can tell you that I have filed a very detailed application to dismiss this case and that Chief Judge Charles Smith granted that application a short while ago. It is important to note that this dismissal is considered to be "without prejudice," which basically means that should additional evidence come to light, or should evidence which is currently not admissible become admissible, our office could refile the charge of First Degree Murder against Mr. Harrington.

I met with the children of John Schweer for about two hours this morning. They have asked me to let you know that they may be issuing a statement through a family representative but would prefer that they not be contacted directly by the media. They did ask me to let you know that, while disappointed in the outcome, they are supportive of the decision to discontinue the prosecution of this case at this time.

The interesting irony of this case is that Terry Harrington was put in prison by his own friends and associates. If they are now choosing to change their sworn testimony there is little I can do to stop that. We play the cards we are dealt as best we can. In this case, there were multiple witnesses who changed their testimony from what was given in 1978, including the recent recantation of Kevin Hughes during his deposition yesterday morning.

I want to thank Detective Dave Dawson (and the rest of the Council Bluffs Police Department for that matter) for his dedication to this case. Detective Dawson was able to track down over 71 of our 82 witnesses and the 11 he couldn't track down actually passed away during some point over the past twenty-six years. Detective Dawson did a fantastic job organizing this case after it sat in our closed files for over twenty-five years.

After personally spending hundreds of hours on this case, I have no doubt that Terry Harrington committed the murder of John Schweer on July 22, 1977. The jury made the right decision in 1978, and the right man went to prison for over twenty-five years. That said, I also have no doubt that the admissible evidence which is left after twenty-six years is not sufficient to sustain a conviction against Mr. Harrington.

The easy decision on this case would have been to let it drop when the Supreme Court granted Mr. Harrington a new trial earlier this year. I certainly had many people recommend that I take that easier path. That would not have been the right decision, however. I owed it to the family of John Schweer to do my best on this case to bring his killer to justice a second time. And while I am disappointed that I will not get the opportunity to put this case before a jury, I am satisfied that nothing else could have been done, by my office or by the Council Bluffs Police Department. As for final justice for Terry Har-

rington, I will defer that honor to a higher power.

On a related note, Curtis McGhee, a co-defendant of Mr. Harrington's in this case, pleaded no contest today to a charge of Second Degree Murder for the death of John Schweer. Mr. McGhee was sentenced to a term of imprisonment of twenty-five years. Since Curtis McGhee had already served more than twenty-five years in prison since his original conviction in 1978, he was credited with time served and left the courthouse late this morning. Even though Mr. McGhee did not actually pull the trigger on the gun that killed John Schweer, our case against him was stronger than against Terry Harrington. Mr. McGhee had made admissions to at least three different people about being with Terry Harrington when Harrington shot a police officer in Council Bluffs. Those statements would likely not be admissible in a trial against Terry Harrington, but would certainly have come into evidence at a trial against Mr. McGhee. Mr. McGhee was offered a chance to plead to Second Degree Murder back in 1978 and, had he taken that deal back then, he would probably have been paroled over ten years ago.

Matt Wilber, Pottawattamie County Attorney.

II. STANDARDS OF REVIEW

A. Summary Judgment

Summary judgment has a special place in civil litigation. The device "has proven its usefulness as a

means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways." *Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991). In operation, the role of summary judgment is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required. *See id.*; *see also Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990).

"[S]ummary judgment is an extreme remedy, and one which is not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances." *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 209 (8th Cir. 1976) (citing *Windsor v. Bethesda Gen. Hosp.*, 523 F.2d 891, 893 n.5 (8th Cir. 1975)). The purpose of the rule is not "to cut litigants off from their right of trial by jury if they really have issues to try," *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (quoting *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 627 (1944)), but to avoid "useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried," *Anderson v. Viking Pump Div., Houdaille Indus., Inc.*, 545 F.2d 1127, 1129 (8th Cir. 1976) (citing *Lyons v. Bd. of Educ.*, 523 F.2d 340, 347 (8th Cir. 1975)).

The plain language of Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party

will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The precise standard for granting summary judgment is well-established and oft-repeated: summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). The court does not weigh the evidence nor make credibility determinations, rather the court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987) ("Summary judgment is not designed to weed out dubious claims, but to eliminate those claims with no basis in material fact.") (citing *Weightwatchers of Quebec, Ltd. v. Weightwatchers Int'l, Inc.*, 398 F. Supp. 1047, 1055 (E.D.N.Y. 1975)).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *See Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 248. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is genuine issue for trial. *See* Fed. R. Civ. P. 5(c), (e); *Celotex*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "[T]he mere existence of *some* alleged factual dispute

between the parties will not defeat a motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis added). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *See id.* at 248. "As to materiality, the substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Motion to Dismiss

A motion to dismiss under Rule 12(b)(1) may challenge either the facial sufficiency or the factual truthfulness of a plaintiff's jurisdictional allegations. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). Regardless, jurisdictional issues are for the court to determine. *See Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). When considering a facial challenge, a court must presume that all of the facts alleged by the plaintiff in support of jurisdiction are true. *See Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) ("In the first instance, the court restricts itself to the face of the pleadings, and the nonmoving party receive[s] the same protections as it would defending against a motion brought under Rule 12(b)(6). The general rule is that a complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" (citations omitted)). A court confronted with a factual challenge must weigh the conflicting evidence concerning jurisdiction, without presuming the truthfulness of the plaintiff's allegations. *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Osborn*, 918 F.2d at 730.

C. Motion for Judgment on the Pleadings

The Motion for Judgment on the Pleadings is filed pursuant to Federal Rule of Civil Procedure 12(c), which provides:

> Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(c). The standard for determining a Rule 12(c) motion is the same as that employed in a Rule 12(b)(6) motion. *See St. Paul Ramsey County Med. Ctr. v. Pennington*, 857 F.2d 1185, 1187 (8th Cir. 1998). Thus, when the Court considers a Motion for Judgment on the Pleadings, it "is constrained by a stringent standard. . . . A complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief." *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 545-46 (8th Cir. 1997) (quoting *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982) (citation omitted) (emphasis added)).

In addition, the complaint must be liberally construed in the light most favorable to the plaintiff and should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of

the necessary factual allegations. *See id.* at 546. Finally, when considering a motion pursuant to Rule 12(c), a court must accept the facts alleged in the complaint as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972).

III. LAW AND ANALYSIS

As noted, for purposes of the present motions Defendants argue that, even assuming that all of the facts as alleged by Plaintiffs in their Complaints are true, they are still entitled to judgment on various bases, including absolute immunity, qualified immunity, sovereign immunity, and qualified privilege. The Court will address each argument in turn.

A. Absolute Immunity

Defendants Hrvol, Richter, Wilber, and Pottawattamie County argue that the following claims made by Plaintiffs are barred by the doctrine of absolute immunity: Counts 9 (§ 1983 claim against Hrvol), 12 (§ 1983 claims against Richter), and 20 (§ 1983 claim against Wilber), filed by McGhee; Counts 1 (§ 1983 claims for fabricated and perjured testimony against Richter and Hrvol) and 2 (§ 1983 claim for withholding evidence against Richter and Hrvol), filed by Harrington; Counts 15 (§ 1985 Conspiracy claim against the 1977 Defendants) and 28 (§ 1985 Conspiracy claim against Wilber and Dawson), filed by McGhee; and Count 3 (§ 1985 Conspiracy claim against the 1977 Defendants), filed by Harrington. In essence, each of the asserted claims allege that the prosecutors Hrvol, Richter, and Wilber improperly concealed exculpatory evidence; concealed the alleged coercion of witnesses; participated in court proceedings; coerced witnesses; participated in the Schweer murder investigation; and conspired with

the respective police defendants to commit the alleged misdeeds against the Plaintiffs.

Prosecutors may be entitled to either absolute or qualified immunity from civil liability under 42 U.S.C. § 1983 for actions undertaken pursuant to their official duties. If the prosecutor is acting as advocate for the state in a criminal prosecution, then the prosecutor is entitled to absolute immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 272 (1993) (hereinafter referred to as "*Buckley I*"). Absolute immunity insulates from liability prosecutorial functions such as the initiation and pursuit of a criminal prosecution, the presentation of the state's case at trial, and other conduct that is intimately associated with the judicial process. *Id.*; *Imbler v. Pachtman*, 424 U.S. 409, 430-31 n. 33 (1976). Qualified immunity, on the other hand, insulates a prosecutor when he pursues actions in an "investigatory" or "administrative" capacity. *Buckley I*, 509 U.S. at 273. In determining whether a particular act fits within the common-law tradition of absolute immunity, the Supreme Court takes a "functional approach," *Burns v. Reed*, 500 U.S. 478, 486 (1991), examining "'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley I*, 509 U.S. at 259 (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988) (finding state court judge was not absolutely immune from damages suit for his administrative decision to demote and dismiss a court employee)); *see also Buckley I*, 509 U.S. at 260 (holding prosecutor's comments to the media have no functional tie to the judicial process because they do not involve presentation of case in court or initiation of prosecution); *Imbler*, 424 U.S. at 431 (holding prosecutor absolutely immune for initiating prosecution and for actions taken in presenting state's case). The United

States Supreme Court has emphasized that "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns*, 500 U.S. at 486.

The functional analysis requires the Court to draw a line between preparatory conduct that is merely administrative or investigative, preparatory conduct that is itself prosecutorial. For instance, some, but not all, of a prosecutor's preparatory acts in initiating a prosecution and presenting a case are absolutely immune. *See Buckley I*, 509 U.S. at 270; *Burns*, 500 U.S. at 492-96; *Imbler*, 424 U.S. at 431 n.33. The prosecutorial nature of an act does not, however, spread backwards, immunizing everything it touches. *See Burns*, 500 U.S. at 495 ("Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive."). Indeed, when performing functions such as investigative and administrative tasks—functions that are not seen as intimately associated with the judicial process—the overriding public policy justification of freeing the judicial process from intimidation and harassment no longer exists, such that the costs on society do not necessitate application of absolute immunity. While the legal distinction regarding the applicability of absolute immunity seems clear, it is substantially more easily stated than applied, particularly in light of the Supreme Court's clear statement that absolute immunity may attach to some decisions by prosecutors regarding obtaining, reviewing, and evaluating evidence:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

Imbler, 424 U.S. at 431 n.33.

Despite the difficulty in evaluating the function at issue, however, the Supreme Court has indicated that prior to the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity. *Buckley I*, 509 U.S. at 273 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."). Correspondingly, the fact that probable cause to arrest has been established "does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." *Id.* at 273

n.5. "Even after [the probable cause] determination, as the opinion dissenting in part, points out . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Id.* Indeed, the Supreme Court rejected the notion that a "true anomaly" would be created by "denying absolute immunity for a state actor's investigative acts made before there is probable cause to have a suspect arrested just because a prosecutor would be entitled to absolute immunity for the malicious prosecution of someone whom he lacked probable cause to indict":

> That criticism ignores the essence of the function test. The reason that lack of probable cause allows us to deny absolute immunity to a state actor for the former function (fabrication of evidence) is that there is no common-law tradition of immunity for it, whether performed by a police officer or prosecutor. The reason that we grant it for the latter function (malicious prosecution) is that we have found a common-law tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not. By insisting on an equation of the two functions merely because a prosecutor might be subject to liability for one but not the other, the dissent allows its particular policy concerns to erase the function test it purports to respect.
>
> In general, the dissent's distress over the denial of absolute immunity for prosecutors who fabricate evidence regarding unsolved crimes . . . seems to conflate the question whether a § 1983 plaintiff has stated a cause

> of action with the question whether the defendant is entitled to absolute immunity for his actions.

Id. Thus, in evaluating whether the prosecutors were immune from liability for their allegedly wrongful actions, the Court must first evaluate whether the acts occurred before or after probable cause to arrest Plaintiffs existed.

"Probable cause for an arrest exists if, at the moment the arrest was made, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that an offense has been committed." *United States v. Rivera*, 370 F.3d 730, 733 (8th Cir. 2004) (citing *United States v. Wajda*, 810 F.2d 754, 758 (8th Cir. 1987)). In the analysis, law enforcement officers are given:

> "substantial latitude in interpreting and drawing inferences from factual circumstances," but such latitude is not without limits. First, because the totality of circumstances determines the existence of probable cause, evidence that tends to negate the possibility that a suspect has committed a crime is relevant to whether the officer has probable cause. An officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists. In this sense, the Fourth Amendment requires that we analyze the weight of all the evidence—not merely the sufficiency of the incriminating evidence—in determining whether [law en-

> forcement] had probable cause to arrest [a suspect].

Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999) (internal citations omitted). Thus, "law enforcement officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect, at least in the absence of exigent circumstances and so long as 'law enforcement would not [be] unduly hampered . . . if the agents . . . wait[ ] to obtain more facts before seeking to arrest.'" *Id.* (quoting *United Sates v. Woolbright*, 831 F.2d 1390, 1394 (8th Cir. 1987); *United States v. Everroad*, 704 F.2d 403, 407 (8th Cir. 1983)). "An officer need not conduct a 'mini-trial' before making an arrest, but probable cause does not exist when a 'minimal further investigation' would have exonerated the suspect." *Id.* (internal citations and quotations omitted). In analyzing whether probable cause for arrest existed, the Court must "ignore the officers' subjective intentions and focus solely on the objective question of whether probable cause existed." *United States v. Clarke*, 110 F.3d 612, 614 (8th Cir. 1997).

"The task of determining whether probable cause to arrest exists as a matter of law in section 1983 actions is different than a similar determination in the context of a direct review of a criminal arrest." *Warren v. City of Lincoln*, 864 F.2d 1436, 1443 (8th Cir. 1989) (citing *McKenzie v. Lamb*, 738 F.2d 1005, 1007 (9th Cir. 1984)). "In the latter situation, we are called upon to review both law and fact and to draw the line as to what is and is not reasonable behavior. By contrast, in a § 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury." *Id.* (citing *McKenzie*, 738 F.2d at 1007-08). "Thus, a

finding that probable cause existed as a matter of law is appropriate 'only if no reasonable jury could find that the officers did or did not have probable cause to arrest.'" *Id.* (quoting McKenzie, 738 F.2d at 1007-08). The Court, therefore, must determine, taking all of Plaintiff's "allegations as true and resolving all inferences in [their] favor, whether a reasonable jury could find that the police officers could not have reasonably believed that [Plaintiffs murdered John Schweer], i.e., did not have probable cause for [their] arrest." *Id.* (quoting *Deary v. Three Unnamed Police Officers*, 746 F.2d 185, 191 (3d Cir. 1984)).

1. Richter and Hrvol.

a. *Plaintiffs' section 1983 claims.*

In the present case, Defendants Richter and Hrvol argue that Harrington and McGhee were suspects in the Schweer murder because other law enforcement agencies discovered their involvement in a car theft ring, and because Kevin Hughes implicated them in the Schweer murder. According to the Defendant prosecutors, the totality of the facts known before either Hrvol or Richter became involved in the case justified them in concluding that probable cause existed to believe that Harrington and McGhee murdered Schweer. Specifically, Hrvol and Richter argue that three separate Nebraska law enforcement entities independently suspected and investigated Harrington and McGhee in a car theft ring; the Omaha Police independently secured Hughes' statement implicating Harrington and McGhee in the Schweer murder; and Hughes eventually described the Schweer murder in detail and led police to McGhee who confirmed Harrington was involved in a car theft ring and owned a shotgun. *See* Defs.' Reply Br. at 7-8.

Viewing the facts proffered by Defendants in isolation, it is doubtful that they are sufficient to establish probable cause to have arrested either Harrington or McGhee. While probable cause to arrest can come from "an identification or a report from a single, credible victim or eyewitness," *Woods v. City of Chicago*, 234 F.3d 979, 996 (7th Cir. 2000), it is clear from the record that law enforcement had abundant reason to doubt the credibility and veracity of Hughes' statements. The day that Hughes was arrested driving a stolen Cadillac Deville (September 9, 1977), he gave a taped interview to Detectives Dean and Tellatin, identifying Harrington, Cub (McGhee), and Anthony Houston as the individuals who had stolen the Deville. Defs.' Supp. App. at 89. Hughes stated that "Terry [Harrington,] they're not mean you know, they do robberies and stuff like that cause Terry's got a sawed-off shotgun in the back of his trunk, .12 gauge pump." McGhee Supp. App. at 327. Hughes further stated that Harrington "just tries to scare people with it." *Id.* at 328. When asked if either Harrington or McGhee would ever "waste somebody" if they "got in a pinch," Hughes stated: "Unt uh, they didn't take no gun with them, they just take it when they do a burglary or robbery or something like that." *Id.*

The day after Hughes was arrested driving a stolen Cadillac (September 10, 1977), Hughes wrote a statement saying that "this light-skinned dude . . . was across the street at Cleaners and they was . . . getting their cars waxed so I went across the street." *Id.* at 273. After discussing potential drug dealing with the light-skinned man and another individual named Dennis, Hughes claims the following occurred:

> Then I said who car is that and the light-skinned dude said mine. I said that a pretty car he said you know how I got it. I said how. He said should I tell him Dennis he said yeah he's cool he said. So the light-skinned dude said I stole it from Council Bluffs he said but I had killed this honkey out of my way then he say don't you tell nobody about this he said because if the word gets out and only three of us know about it I'm coming to see you, you dig, and I said yeah so I got out the car and came back across the street. I seen this light-skinned dude before with Dennis for about a year.

Id. at 273. Detective Larsen also discussed Hughes' information in a report dated September 13, 1977:

> [Three persons, Kevin Mack,[9] Roderick Jones, and Candy Pride were arrested in Lincoln, Nebraska driving a 1977 Cadillac Deville stolen from Fremont, Nebraska]. Upon arrival in Lincoln, Nebraska Officers interrogated Mack concerning his involvement in the theft . . . with theory in mind that this vehicle may have been involved in a theft ring possibly connected to [Schweer's] homicide. The results of the interview with Mack are as follows: He stated he received the vehicle early Friday morning from his cousin, Houston, Anthony. And that he knew the vehicle was stolen upon receipt of it. . . .

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[9] Kevin Hughes is frequently referred to as Kevin Mack in various supporting documentation. The names will be used interchangeably.

In bringing up the subject of the homicide to Kevin Mack, Officers learned that he had some knowledge concerning this crime.

Kevin Mack stated that approximately July 25, 1977 he was in the area of 20th and Lake Street, Omaha, Nebraska at a car wash he knows as Hoskins' when he observed a 1974 Cadillac Fleetwood Brougham belonging to a person he knew as Dennis ? (last name unknown). As he approached the vehicle he observed Dennis? and a light-skinned man sitting in the vehicle. Dennis was behind the wheel and light-skinned man in the front passenger's seat. Dennis called Mack over to the car and told him to get in the back. Dennis said, "Want to make two to three grand?" Mack replied, "How?" Dennis stated, "Deliver 'II' to Kansas City." Mack replied, "That's some pretty heavy stuff, I don't want to get involved, and I have to go to school you know." Mack then changed the subject and mentioned a black Continental that was receiving a simonize wax job at the car wash. He remembers saying something similar to "Nice Continental, that's really a pretty car." The light-skinned man said it was his then turned to Dennis and said "Tell him how I got it." "Dennis replied that it was stolen and proceeded to explain that it was taken from Council Bluffs, Iowa from McIntyre Oldsmobile-Cadillac and then said something about you saw it on TV." The light-skinned man then became somewhat upset and there was a discussion of Kevin's trusworth[i]ness to which Dennis replied that he was a brother and that he was trustworthy with

> any information. The light-skinned man then made the statement, "The motherfucking honky was in my way."
>
> . . . .
>
> Officers asked Mack, Kevin Duane to describe persons involved in the theft of the vehicles from Fremont, Nebraska and the 1977 black Cutlass Supreme from Council Bluffs, Iowa. He said his cousin HOUSTON, Anthony was involved in auto thefts as was HARRINGTON, Terry, and a person known only to him as Cub. He described Harrington, Terry as a doper who is involved in numerous thefts and robberies. He stated Harrington carries a sawed-off 12 ga. pump shotgun in the trunk of his vehicle. He stated he also saw red plastic 12 ga. shotgun shells in the trunk of Harrington's vehicle [described as a green Oldsmobile Delta 88].

Id. at 346-47. Detective Larsen went on to state that he and Officer Howlett went to Omaha to do computer work, which ultimately revealed that Hughes was very close with an individual named Dennis Jackson. *Id.* at 348. Jackson, in turn, was stopped by Omaha police in several locations on August 23, 1977, driving a black 1974 Cadillac. *Id.* He was accompanied by an individual named Steven Frazier, who fit the description of the "light-skinned dude" given by Hughes. *Id.* Frazier, the purported "light-skinned dude" was alleged by Hughes to have killed Schweer while stealing a Lincoln Continental from McIntyre Oldsmobile. Authorities were well aware that no vehicle was stolen the night of the murder. Hughes later accused an individual named Arnold Kelly of the Schweer murder. Subsequent police in-

vestigation revealed that Kelly was in the Job Corp in Kansas City at the time of the murder.

Hughes, in custody for possession of a stolen automobile and felony assault on a police officer (charges that were later dropped), was interviewed again on September 30, 1977. He indicated that Harrington and others had told him that they had killed Schweer and that those individuals had threatened Hughes not to say anything. Defs.' Supp. App. at 42-43. Hughes handwrote a statement to this effect, noting that he was told by "Terry Harrington that him, Cub, Anthony Houston was the ones who shot the man over in Council Bluffs." *Id.* at 49. Officers believed that Hughes was lying and requested a polygraph examination. *Id.* at 42-43. Hughes consented to the polygraph, and the examiner "advised the officers that he had received indications of deception on the part of Hughes." *Id.* After being informed of this fact, Hughes, a short time later, stated that he had been lying and indicated that he had been with Harrington in his green 1970 Oldsmobile on the night that Schweer was murdered. *Id.* In a handwritten statement dated September 30, 1977, at 4:00 p.m., Hughes stated:

> Mc, Terry, Cub, Anthony [Houston] went over to McIntyre Olds . . . and Terry, Cub, Anthony went to the lot and I was in the car listening to music and I heard one shot and the car was parked on a dirt road when Terry, Cub, Anthony got out and Terry went to the trunk and got this 12 gauge and they went over. And then they came running from behind the building and Terry had put the gun under his seat under the drivers' seat. Terry drove back to Omaha.

Defs.' Supp. App. at 50. After authorities discovered that Houston was in jail the night of Schweer's murder, Hughes' dropped Houston from his version of events.

Hughes gave information about how the shooting occurred, but because officers were not familiar with the territory described, they requested permission to take Hughes to the Council Bluffs scene of the crime. *Id.* at 42-43. "Hughes pointed out to officers where they had parked the Harrington automobile on the night that they had gone to steal another automobile and where Hughes stated he saw the other three parties [Harrington, McGhee, and Houston] running from after he heard a shot." *Id.* at 44. Hughes gave a taped interview to Omaha police after returning from the crime scene. A reasonable investigation would have revealed that Hughes' story did not match the facts of Schweer's murder. First, Houston was in jail on the night of the murder. Second, Schweer was not murdered in the location indicated by Hughes (near the McIntyre Oldsmobile lot south of 32nd Avenue in Council Bluffs), but rather on the other side of the street near O'Neill Datsun and Bluffs Toyota (north of 32nd Avenue). Third, Hughes' September 9 claim that Harrington, McGhee, and Houston stole the Fremont vehicles was dubious at best, in light of the fact that Hughes was driving the 1977 Cadillac stolen from Fremont when Lincoln police picked him up, and Harrington, McGhee, and Houston were not even in the car. Additionally, the car had vanity plates with the name "Kevin" on it and a t-shirt revealed later to belong to Roderick Jones was in the 1976 Lincoln when police recovered it. With regard to the 1977 Cutlass, evidence available to authorities linked it more to Hughes than to either Harrington or McGhee, as the

car was retrieved at 2517 Burdette Street (on September 10, 1977, Hughes stated he lived at 2617 Burdette Street), and had Hughes' mother's boyfriend's license plates on it. Fourth, in a transcription of Hughes' interrogation, he originally stated that Harrington retrieved a 20-gauge shotgun pump action from his trunk, but then stated Harrington got a 12-gauge shotgun and wrapped it in a tan leather coat. McGhee Supp. App. at 421, 429. McGhee, however, claimed that Harrington had a .410 shotgun, and indeed, a .410 shotgun was recovered when authorities searched Harrington's residence, not a 12-gauge shotgun. Further, McGhee's deposition reveals that he originally told police that the weapon Harrington carried was not even a shotgun, but a pistol. *Id.* at 414-16, and Larsen also confirmed that Hughes had told authorities that Harrington had a pistol. *Id.* at 388-89. Fifth, Hughes claimed that the others were gone from Harrington's car for only 5-6 minutes. *Id.* at 422. Hughes also stated that the murder occurred between 12:30 and 1:00 a.m., *Id.* at 420-22, but employees working at a trucking company near the murder scene reported hearing a loud explosion after 3:00 a.m. *Id.* at 466, 467. Likewise, the medical examiner reported that Schweer died at approximately 4:00 a.m. *Id.* at 468. Sixth, Hughes' accounts to police about who picked up whom in the 1977 Cadillac conflicted with Pride's version of those events (Hughes originally stated that he drove up to Jones and Pride), though Hughes eventually changed his story to match Pride's after hearing it (Pride stated that Houston picked Hughes, Pride, and Jones up). Finally, police possessed exculpatory evidence implicating Charles Gates as the possible murderer of Schweer. "An officer contemplating an arrest is not free to disregard plainly ex-

culpatory evidence, even if substantial inculpatory evidence . . . suggests that probable cause exists." *Anderson v. Cass County, Mo.*, 367 F.3d 741, 747 (8th Cir. 2004). By September 30, 1977, authorities were aware that Schweer had seen a man fitting Gates' description only nights before the murder; four witnesses saw the same thing; police found foot and dog prints near Schweer's body; and Gates was a suspect in a 1963 homicide in Omaha.

At approximately 7:00 p.m on September 30, 1977, Detectives Brown and Larsen, along with Hrvol, arrived in Omaha and interrogated Hughes for approximately 2 hours, though there appears to be no record of what transpired during that interrogation. Thus, at the time that Larsen, Brown, and Hrvol became involved with Hughes regarding Schweer's murder, Hughes had given no less than four different accounts of the murder, first accusing the "light-skinned dude" (Frazier), then accusing Arnold Kelly, then accusing McGhee, Houston, and Harrington, and then implicating himself as being present. Officials knew that Hughes' account of events kept changing, and that it did not match up with the actual details of the crime scene or with information received from other sources. The 1977 Defendants also were aware that a viable suspect, Charles Gates, could have been responsible for Schweer's murder. Moreover, for purposes of the present Motions for Summary Judgment, Defendants have admitted that both the police and prosecutors coerced and coached Hughes' testimony.

The credibility and reliability of a person providing information to the police are important factors to be considered in a determination of probable cause. See *Illinois v. Gates*, 462 U.S. 213, 230 (1983). They

are not, however, "separate and independent requirements to be rigidly exacted in every case." *Id.* Probable cause is to be determined based upon the totality of the circumstances in each case. *See id.; see also Massachusetts v. Upton*, 466 U.S. 727, 730-31 (1984). This standard allows "an informant's clear basis of knowledge [to] be balanced against, rather than automatically overruled by, that informant's lack of a 'track record' of reliability." *United States v. Reivich*, 793 F.2d 957, 959 (8th Cir. 1986). In support of their conclusion that probable cause existed before any of the Defendants entered the scene, Defendants cite *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996), for the proposition that despite inconsistencies in Hughes' story, probable cause was established because Hughes had made detailed statements about the Schweer murder and led police to McGhee who confirmed that Harrington was in the car theft ring and owned a shotgun. In *Brodnicki*, a nine-year old victim gave a slightly inaccurate description of her kidnapper. *Brodnicki*, 75 F.3d at 1263 (noting that the victim stated her kidnapper was 5'11", 220 pounds, with dark brown hair, but Brodnicki was 6'2", 280 pounds, and had dirty-blonde hair, amongst other things). Finding that the police had other evidence supporting probable cause, and noting the "tender age" of the victim, the Eighth Circuit Court of Appeals found that the inconsistencies in the victim's description of her kidnapper did not defeat the probable cause finding and that police reasonably believed their victim-informant was reliable and reasonably relied on that information. *Id.* at 1265.

Unlike in *Brodnicki*, at the time Brown, Larsen, and Hrvol became involved with Hughes, police had ample reason to doubt Hughes' credibility, as noted

above. Certainly, independent corroboration of the facts given by an unreliable informant should be examined in the totality of the circumstances test, *United States v. LaMorie*, 100 F.3d 547, 553 (8th Cir. 1996), but the record here reveals that the more independent corroboration that was attempted, the more variances between Hughes' story and the actual facts of the murder became apparent. Indeed, the only corroboration of Hughes' story alleged by Defendants as of September 30, 1977, is the fact that McGhee confirmed that Harrington kept a shotgun in the trunk of his car, and that McGhee, Harrington, Hughes, and Houston were involved in a car theft ring. Defs.' Supp. App. at 54-64. McGhee, however, stated that he believed the gun kept in the trunk of Harrington's car was a .410, and indeed, a search of Harrington's residence in October 1977 turned up a .410 shotgun, not a 12-gauge shotgun like the one used to kill Schweer. These "corroborative facts" offer little, if anything to the probable cause evaluation. While certainly the corroboration of even minor, innocent details can bolster a conclusion that an informant is reliable, see *United States v. Ramos*, 818 F.2d 1392, 1397 n.7 (8th Cir. 1987), the confirmation that Harrington kept a shotgun (though of a different variety than that which Hughes identified) and the fact that a group of people were involved in a car theft ring, cannot overcome the plethora of contradictions and falsities evident when simply comparing Hughes' various stories to the facts known by law enforcement regarding the murder of John Schweer. A reasonable jury could find that on September 30, 1977, authorities lacked probable cause to arrest the Plaintiffs.

Between September 30, 1977, the date that Brown, Larsen, and Hrvol first had contact with

Kevin Hughes, and the dates that Harrington and McGhee were arrested, November 16 and 17, 1977, authorities did acquire additional information and statements from other witnesses that could have been relevant to the Schweer murder. Authorities searched Harrington's home, finding a .410 shotgun and a reddish, maroon, vinyl jacket. The jacket was tested for evidence of gunpowder in light of Hughes' claim that Harrington wrapped his (tan leather) jacket around the shotgun. The examination of the jacket, however, revealed only two particles of unburned smokeless gunpowder. The technician analyzing the particles could not say what type of gun the particles came from, and they were never compared with the gunpowder residue found at the Schweer murder scene. There was also no attempt to rule out the possibility that the particles could have come from Harrington's .410 shotgun.

Authorities also interviewed Roderick Jones in October 1977. In a taped interview, Jones claimed that everything he knew came from Hughes, and that he was at 24th Street and Pratt (the intersection where Hughes claimed McGhee and Harrington picked him up on the night of the murder) on a night that could have been the night of the murder when Harrington and McGhee picked up Hughes. Jones had implicated himself in using the key-switch scheme on several occasions to steal cars with Hughes, and was purportedly told by Brown that if he did not say that he saw Harrington, McGhee and Hughes together on the night of the murder, he would be charged with stealing cars and with Schweer's murder. Candice Pride also stated in October that she was present at the intersection when Harrington and McGhee picked up Hughes. Pride had been caught in the stolen Cadillac with Hughes

and Jones, and was also dating Hughes. Larsen and Brown are claimed to have threatened Pride with Hughes being charged with murder to obtain her statement. Larsen and Brown also interviewed another of Hughes' girlfriends, Linda Lee, in October 1977. They allegedly told Lee that her boyfriend, Hughes, would be charged with murder unless she corroborated his story. Lee then claimed that she saw Harrington and another black male in Harrington's car waiting for Hughes on the night of the murder. Clyde Jacobs was also questioned by authorities, and was allegedly threatened with being charged with Schweer's murder. Jacobs stated that he was present at 24th and Pratt when Harrington and "another colored guy" picked up Hughes. Jacobs later said that McGhee was with Harrington when Hughes was picked up. Despite the statements of these individuals, Defendants have not denied, for purposes of this motion, coercing and coaching their statements. Indeed, it is alleged that authorities left Jones, Pride, Jacobs, and Hughes alone together before questioning them so that they could "get their stories straight." Despite all of these statements incriminating McGhee and Harrington, however, the fact remains that all of the witnesses gave shifting stories, all were cohorts of Hughes, their statements were less than precise as to the time and date that they saw Harrington and McGhee pick up Hughes, and all were allegedly threatened with some sort of legal action (or that legal action would be taken against a loved one). Considering this evidence with the evidence in the possession of law enforcement (including the serious doubts about Hughes' credibility, substantial contradictions in his statement, and exculpatory evidence including the existence of another possible suspect for the murder) prior to Sep-

tember 30, 1977, the Court still must conclude that a reasonable jury could find probable cause was lacking to arrest Harrington and McGhee on November 16 and 17, 1977.

Additional evidence regarding McGhee came to the prosecutors' attention through jailhouse informants that were housed with him following his arrest in November 1977. Tyrone Pierce, incarcerated for burglary and car theft, had a history of informing on other prisoners and was approached by Larsen and Hrvol. Larsen and Hrvol allegedly told Pierce that if he testified against McGhee, his charges would be reduced. Pierce was placed in a cell next to McGhee's, and shortly thereafter told Larsen and Hrvol that McGhee had told him he murdered Schweer while they were bragging to each other about their criminal accomplishments. Larsen and Brown also allegedly told Larry Plater that they needed witnesses and that he might not have to go to a reformatory if he testified against McGhee. Plater claimed that McGhee told him a few days after the murder that he was present when Harrington killed a police officer. Eric Hartwell contacted the Defendants from the Anamosa prison, where he was serving ten years for breaking and entering. Larsen and Hrvol interviewed Hartwell at the Anamosa prison on April 7, 1978, and Hartwell signed a statement setting forth that while he and McGhee were incarcerated together in the Pottawattamie County jail, McGhee told him that he, Harrington, and another person got a 12-gauge shotgun out the trunk, wrapped it in a jacket, went around the back of the dealership, and Harrington shot the "sheriff" twice. Hartwell admitted, however, that McGhee had the True Information dated February 17, 1978, with him in jail, but Hartwell denied looking at the document.

Hartwell expected and receive a reduction in his sentence in exchange for his testimony.

Again, the Court believes that a reasonable jury could still find probable cause lacking viewing the totality of the circumstances known even after the three jailhouse informants offered testimony about McGhee allegedly discussing Schweer's murder. The Second Circuit Court of Appeals has noted that "numerous scholars and criminal justice experts have found the testimony by 'jail house snitches' to be highly unreliable" because such informants typically have "a significant incentive to offer testimony against other Defendants in order to curry favor with prosecutors" and because their proffered testimony is "oftentimes partially or completely fabricated." *Zappulla v. New York*, 391 F.3d 462, 470 n.3 (2d. Cir. 2004) (citing Daryl K. Brown, Essay, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 Colum. L. Rev. 801, 824 (2004); Jana Winograde, Comment, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 Cal. L. Rev. 755, 756 (1990)). Accordingly, the Court must conclude that, even given all information known to law enforcement at the time Harrington and McGhee went to trial in 1978, a reasonable jury could find that probable cause was lacking to arrest them for Schweer's murder.

Despite the Court's conclusion that a reasonable jury could find probable cause lacking to arrest the Plaintiffs at all stages of the proceedings prior to trial, the Court must still evaluate whether absolute immunity is available to Richter or Hrvol at any stage of the proceedings. Under both Supreme Court and Eighth Circuit jurisprudence, the law is clear

that prosecutors enjoy absolute immunity only for actions within the scope of their prosecutorial duties, and not for administrative or investigative duties. *See Smith v. Updegraff*, 744 F.2d 1354, 1364 (8th Cir. 1984). "Prosecutors must act 'clearly outside their jurisdiction' (i.e., pursuant to their investigatory duties) to lose the defense of absolute immunity." *Webster v. Gibson*, 913 F.2d 510, 514 (8th Cir. 1990) (citing *Wilhelm v. Turner*, 431 F.2d 177, 182-83 (8th Cir. 1970)). As noted previously, "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the functions in question." *Burns*, 500 U.S. at 486. A short review of the history and purpose of the absolute immunity doctrine sheds some light on its applicability to the present case.

In *Imbler*, the Supreme Court evaluated for the first time whether the common law doctrine of absolute immunity, long extended to judicial officers in malicious prosecution cases, should be extended to prosecutors in the context of § 1983 actions. *Imbler*, 424 U.S. at 421-22 (citing *Griffith v. Slinkard*, 44 N.E. 1001 (1896) (finding that a prosecutor without probable cause who added a name to a grand jury true bill after the grand jurors refused to indict him was entitled to absolute immunity from a charge of malicious prosecution) and *Yaselli v. Goff*, 275 U.S. 503 (1927) (affirming a Second Circuit decision granting absolute immunity on a claim of malicious prosecution where the Special Assistant to the Attorney General of the United States maliciously and without probable cause procured plaintiff's grand jury indictment by the willful introduction of false and misleading evidence)). In finding that absolute prosecutorial immunity should apply to § 1983 actions, the *Imbler* Court stated:

If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and ultimately in every case the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense

in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system. Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.

The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to § 1983 liability. Various

post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.

We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."
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> *Gregoire v. Biddle*, 177 F.2d 579, 581 (C.A.2 1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950).

Imbler, 424 U.S. at 424-28 (some internal citations omitted). Thus, the Supreme Court held "only that initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431.

In light of *Imbler*, the Court must find that the filing of a True Information against the Plaintiffs on February 17, 1978, constitutes the "initiation of criminal proceedings" and the prosecutors are, hence, absolutely immune from liability, even in the absence of probable cause. In the State of Iowa, a prosecutor charging a defendant with an indictable offense by filing a trial information must endorse the information as a true information. Iowa R. Crim. P. 2.5(1); 2.5(2); *State v. Petersen*, 678 N.W.2d 611, 613 (Iowa 2004).[10] "When the court approves the trial in-

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[10] The requirement that the County Attorney must endorse the charging document as a "true information" is long-standing in Iowa, dating back at least to 1924. *State v. Voss*, 206 N.W.292, 293 (Iowa 1925) ("Section 13646, Code of 1924, requires that such information shall be indorsed 'a true information,' which indorsement shall be signed by the county attorney."); *see also*

formation, it determines whether there is probable cause to detain the Defendant to answer the charge." *Petersen*, 678 N.W.2d at 614 (citing *State v. Shank*, 296 N.W.2d 791, 792 (Iowa 1980) ("[A] judge or magistrate must approve [the information] by finding that the evidence shown in the minutes, 'if unexplained, would warrant a conviction by the trial jury.'")). The conclusion that filing the True Information is protected by absolute immunity is consistent with the Supreme Court's holding in *Kalina v. Fletcher*, 522 U.S. 118 (1997). There, Fletcher sued a deputy prosecuting attorney under § 1983 for commencing a criminal proceeding by filing three documents: an information charging Fletcher with burglary, a motion for an arrest warrant, and a "Certification for Determination of Probable Cause," which contained two inaccuracies, but was filed in support of the arrest warrant to satisfy a Washington Criminal Rule requiring that an arrest warrant be supported by "sworn testimony." *Kalina*, 522 U.S. at 120-21. Based on the certification, the trial court found probable cause and issued an arrest warrant for Fletcher. *Id.* at 121. The Court found that the prosecutor was not protected by absolute immunity under § 1983 because state law did not require that the prosecutor be the one to make a sworn statement supporting probable cause. *Id.* at 129-30. Thus, the prosecutor "performed an act that any competent witness might have performed" and hence could be liable to the same extent as any complaining witness. *Id.* Here, in contrast, Iowa law required that the

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Burry v. Haynes, 7 N.W.2d 914, 917 (Iowa 1943) ("Section 13646, Code 1935, did require the county attorney's signature to an endorsement to the information. It provided as follows: 'Such information shall be indorsed, "a true information", which indorsement shall be signed by the county attorney.'")

prosecutor endorse the true information. Thus, the task could not have been performed by anyone other than a prosecutor, and distinguishes the present facts sufficiently from *Kalina* such that the function of signing the True Information must necessarily be deemed an intimate part of the judicial process. See *Schenk v. Chavis*, 461 F.3d 1043, 1046 (8th Cir. 2006) (prosecutors actions in signing and filing a criminal complaint constituted prosecutorial functions). Likewise, any actions taken by Hrvol or Richter in actually presenting the State's case against Harrington and McGhee at trial must be considered part of the judicial process and absolutely immune from liability. *See, e.g., Burns*, 500 U.S. at 490-91 (appearing before a judge and presenting evidence in court part of "role as advocate" absolutely immune); *Imbler*, 424 U.S. at 431 (presenting the State's case at trial is absolutely immune from liability); *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987) ("Allegations that a prosecutor knowingly offered, used or presented false, misleading or perjured testimony at trial or before a grand jury do not defeat absolute prosecutorial immunity, regardless of how reprehensible such conduct would be if it occurred. The same is true for allegations of withholding or suppressing exculpatory evidence. . . . Soliciting and suborning perjured testimony does not create liability in damages for a prosecutor . . . ."), cert denied, *Lallak v. Morris*, 484 U.S. 828 (1987).

Prior to the filing of the True Information, however, the record supports a conclusion that both Hrvol and Richter were acting in an investigatory capacity rather than in an advocatory capacity. First, as the Court has pointed out, it appears that probable cause was lacking at all stages of the proceedings, given the wealth of information, known to

the prosecutors, that any inculpatory evidence against Harrington and McGhee was plagued with inconsistencies, incompleteness, and verifiable lies, and due to their knowledge that significant exculpatory evidence also existed. Supreme Court precedent supports the conclusion that, because no probable cause was established at the time that Hrvol and Richter are alleged to have coerced witnesses and fabricated evidence prior to the filing of the True Information, the prosecutors were acting in an investigatory capacity rather than an advocatory capacity. *See Buckley I*, 509 U.S. at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested").

Furthermore, evaluating the functions performed by Richter and Hrvol supports a conclusion that their actions prior to the filing of the True Information were investigatory in nature, and thus entitled, at best, to qualified immunity. Richter testified at deposition that he oversaw the prosecutor's participation in the investigation of the Schweer murder and that his office participated to a significant extent in the investigation. Harrington's Statement of Undisputed Facts ¶¶ 16-17. Hrvol participated in a canvassing of the neighborhood near the scene of the murder, and did a lot of other "stuff" related to the investigation because the "police field investigators needed help with the investigation and put a lot of man-hours into the investigation." *Id.* ¶¶ 5-6. While Hrvol was not present on every occasion that Hughes was questioned by the police, he was present with them on nearly every occasion when Hughes was interviewed, including when Hughes was taken to the scene of the Schweer murder. *Id.* at ¶ 20. Hence, it is reasonable to presume that Hrvol was present when law enforcement caught Hughes in lies, told

him he'd "better cough up the truth" or it wouldn't look good for him, and when Hughes was told that he would be deemed the "trigger man" if he didn't come up with something. *Id.* ¶¶ 21-22. Hrvol admits that he was not even assigned the responsibility of prosecuting the case throughout the early part of the investigation, but rather was assisting the police in the investigation. *Id.* ¶ 7 ("The only one in the office intensely involved in the investigation was me [Hrvol]"). Richter personally interviewed a witness after the murder, but before Harrington or McGhee were suspects, who stated that he had seen Charles Gates walking his dogs in the vicinity of the murder. *Id.* ¶ 18. Richter also interviewed Hughes only a day after police and prosecutors took him to the scene of the murder (for the fourth or fifth time)[11] to "reenact" Hughes' account of the events. During that interview, Richter cited Iowa Code § 769.19, a provision entitled "Investigation by prosecuting attorney," which permitted county attorneys to subpoena witnesses whose testimony may be required in "investigating an offense." McGhee Supp. App. at 517. Richter and Hrvol, along with the police, consulted an astrologer to prepare astrological charts on Gates. Harrington's Statement of Undisputed Facts ¶ 19. Indeed, both Richter and Hrvol worked closely with the Council Bluffs Police Department during the entirety of the Schweer murder investigation, "including participating in witness interview before any arrests were made." *Id.* ¶ 2. Council Bluffs police officer Larry Williams testified that Hrvol and Richter

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[11] Hughes has testified that police and prosecutors took him to the scene of Schweer's murder four or five times, and that they discussed the case with him "too many times to count." McGhee Supp. App. at 303-04.

worked side by side with the police on the investigation. *Id.* ¶ 30.

Plaintiffs allege that Defendants actually participated in the coercion of witnesses and in the fabrication of false testimony by making promises to putative witnesses that criminal charges would be dismissed or reduced, by making threats of criminal prosecution, and by coaching and altering the witness statements to better fit the facts of the Schweer murder. The fact that Hrvol and Richter do not contest any of the allegations of fact made by Plaintiffs for purposes of the summary judgment motion prohibits the Court from concluding that these actions were the function of advocates rather than investigators. The Court finds that these activities took place prior to the establishment of probable cause and reasonably could be viewed as causatively violating the Plaintiffs' rights to a fair trial. Because Defendants have fundamentally admitted that they coached and coerced witnesses and fabricated evidence, the prosecutors have utterly failed to carry their burden to show that such acts were "intimately associated with the judicial process" such that they are entitled to absolute immunity. See *Buckley I*, 509 U.S. at 275 ("Respondents have not cited any authority that supports an argument that a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime was immune from liability at common law, either in 1871 or at any date before the enactment of § 1983. It therefore remains protected only by qualified immunity."); *Genzler v. Longanbach*, 410 F.3d 630, 638-41 (9th Cir. 2005) (holding prosecutor and investigator not entitled to absolute immunity for encouraging witness, during meetings prior to bail hearing and more than month prior to preliminary hearing, to fabricate testimony); *Brown*

v. Daniel, 230 F.3d 1351 (4th Cir. 2000) ("When acting in an investigative role, no government official, including prosecutors, is entitled to absolute immunity.") (unpublished disposition); *Moore v. Valder*, 65 F.3d 189, 194- 95 (D.C. Cir. 1995) ("Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution."); *Hill v. City of New York*, 45 F.3d 653, 662 (2d Cir. 1995) (finding absolute immunity does not protect efforts of prosecutors to manufacture evidence during the investigatory phase of a criminal case); *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992) (declining to extend prosecutorial immunity to a district attorney who manufactured evidence); *Spurlock v. Whitley*, 971 F. Supp. 1166, 1180 (M.D. Tenn. 1997) (denying absolute immunity for prosecutor's alleged efforts to have a witness testify falsely).[12]

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[12] Defendants cite to *Reasonover v. St. Louis County*, 477 F.3d 569, 579-80 (8th Cir. 2006) for the proposition that a prosecutor is immune from liability for interviewing witnesses because that function is prosecutorial rather than investigatory. While the Eighth Circuit in *Reasonover* did find that "[n]ot all of an advocate's work is done in the courtroom. For a lawyer to properly try a case, he must confer with witnesses, and conduct some of his own factual investigation," the facts of *Reasonover* are distinguishable. The prosecutor in *Reasonover* only had the role of prosecuting the case. He did not participate in fabricating evidence and interviewed witnesses only after they had been brought to him by the police, as opposed to seeking out and interviewing witnesses himself. *See id.* at 577 ("Police

With regard to Plaintiffs' allegation that Defendants intentionally concealed exculpatory information, the outcome is necessarily different. Plaintiffs claim that Richter and Hrvol intentionally concealed exculpatory evidence and promises of leniency or payments made to witnesses. In 1963, the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. There can be no doubt that evidence of promises or threats in exchange for testimony and evidence of an alternate suspect would have been material to determining Plaintiffs' guilt or innocence in their 1978 trials. See *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (requiring prosecutors to disclose "evidence of any understanding or agreement as to future prosecution" relating to any government witnesses). Nonetheless, extensive authority exists to support a conclusion that the failure to turn over exculpatory evidence is necessarily a function intimately associated with the judicial process. *See Imbler*, 424 U.S. at 431, n.34 (rejecting dissenting Justice White's recommendation that a prosecutor should be denied absolute immunity for willfully suppressing exculpatory information); *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999) (per curiam) (finding that the decision to withhold or turn over exculpatory information turns on "evaluating the credibility of the alleged exculpatory information, and [on] determining its bearing on the trial," thus

working independently on Lyner's case later brought Lyner to the prosecutor, Goldman, because Lyner told the police she had information about the Buckley murder.").

making the function necessarily one requiring the exercise of prosecutorial discretion (citations omitted)); *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994) (holding a prosecutor absolutely immune for failure to turn over exculpatory evidence when he became aware of it "after [the § 1983 plaintiff's] arrest, but before his conviction"). Moreover, the duty to turn over *Brady* evidence necessarily arises in the context of preparation for trial, thus making it inherently a prosecutorial function intimately associated with the trial process. See *United States v. Banky-Alli*, No. 05-0589CR, 2005 WL 3116754, at *2 (2d. Cir. Nov. 22, 2005) ("We have declined to specify the timing of disclosure that *Brady* requires, but rather have required that *Brady* material be disclosed 'in time for its effective use at trial.'") (citing *Leka v. Portundo*, 257 F.3d 89, 100 (2d Cir. 2001) (noting that "disclosure prior to trial is not mandated")).

The question of whether Hrvol and Richter should receive absolute immunity for allegedly coercing jailhouse informants to give false testimony presents a slightly more difficult issue, primarily because the activity took place after the filing of the True Information (which the Court has found is protected by absolute immunity). The Complaints allege that Hrvol, along with Larsen, sought out Pierce to get him to testify against McGhee. Hrvol is alleged to have told Pierce to lie about McGhee's confession in exchange for a reduction in his own sentence, and then made arrangements to place Pierce in a cell near McGhee to effectuate this purpose. Harrington's Statement of Undisputed Facts ¶ 67. It is also claimed that Hrvol met with Pierce several times, without Pierce's attorney present, to tell Pierce what to say. *Id.* ¶ 71. Likewise, Hrvol was

present when Eric Hartwell was initially interviewed, and helped to "clean up" his story to match other false testimony they had obtained.[13]

The fabrication and coercion of evidence claims against Richter and Hrvol regarding the jailhouse informant witnesses presents something of a conundrum. On the one hand, a jury could reasonably find that even the jailhouse informant testimony was insufficient to establish probable cause against the Plaintiffs, indicating that the prosecutors were necessarily acting in an investigatory capacity under *Buckley I.* Additionally, *Buckley I* noted that the fact that a prosecutor's bad act occurs after probable cause is established does not necessarily immunize it from liability, as a prosecutor may still act in an investigatory capacity even after probable cause has been established. On the other hand, once the True Information was filed against each of the Plaintiffs, actions by the prosecutor in securing sufficient testimony to take the case to trial served the function of furthering the prosecutors' preparation for trial, i.e., whether the evidence up to that point was fabricated or not, prosecutors already had sufficient information to proceed to trial. Plaintiffs appear to argue that the lack of probable cause means that the prosecutors could never have put on their "advocate" hat, even during the trial, under *Buckley I.* To make such a finding, however, would result in the exception to prosecutorial immunity swallowing the rule, and would fly in the face of the purposes for such immu-

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[13] McGhee had testified at his own trial in 1978 that Harrington picked him up at his home, then picked up Hughes, and then dropped McGhee off at his girlfriends, and that these events could have taken place on the night of Schweer's murder.

nity in the first instance. Given the choices, and considering the fact that the informant testimony was elicited after the filing of the formal charging documents, the Court finds that the prosecutors are entitled to absolute immunity for their role in coercing and fabricating jailhouse informant testimony.

b. *Section 1985 conspiracy claim.*

Count 15 of McGhee's Complaint, and Count 3 of Harrington's Complaint allege that Richter and Hrvol, along with Larsen and Brown, conspired with each other and perhaps others to arrest, prosecute, convict and imprison Plaintiffs for the murder of John Schweer when they lacked sufficient facts to support a reasonable and honest belief that McGhee was guilty. The Complaints charge that, in furtherance of the conspiracy, Richter, Hrvol, Larsen, and Brown fabricated evidence, concealed the fabrication of evidence, and concealed other exculpatory evidence to frame the Plaintiffs for a crime they did not commit. According to Plaintiffs, the conspiracy violated Plaintiffs' rights not to be deprived of liberty without probable cause, as well as their due process rights under the Fourth, Fifth, and Fourteenth Amendments. The Complaints also allege that the purpose and effect of the conspiracy was to deprive Plaintiffs of the equal protection of the laws because of their race, in violation of the Fourteenth Amendment.

Title 42, United States Code, § 1985(3) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indi-

> rectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1983(3). "Unlike § 1983, § 1985(3) does not provide a cause of action for the deprivation of independent rights 'secured by the Constitution and laws.' Instead, it prohibits private conspiracies intended to prevent persons or classes of persons from the equal exercise of any of their civil rights. No violation of an independent legal right is required; nor does § 1985(3) require state action or the involvement of the State in any other way." *United Bhd. of Carpenters and Joiners of Am. v. Scott*, 463 U.S. 825, 840-41 (1983).

Defendants argue that Plaintiffs have failed to plead with specificity that a "meeting of the minds directed at unconstitutional action" occurred. Defendants cite *Myers*, 810 F.2d at 1453 for the proposition that "a conclusory and unsupported allegation of

conspiratorial purpose" is insufficient to state a valid conspiracy claim under § 1985. The Court finds Defendants' argument to be without merit. Throughout the pleadings, Plaintiffs allege that Hrvol, Richter, Brown, and Larsen made joint decisions to fabricate evidence and to arrest the Plaintiffs without probable cause for the purpose of denying Plaintiffs their constitutional rights. The fact that the specific count in question does not use the phrase "meeting of the minds" does not prohibit the claim from proceeding, given Plaintiffs' allegations that the four Defendants conspired with each other and the numerous statements of fact (which Defendants do not resist for the present motions) indicating that the four acted jointly with an intent to wrongfully convict the Plaintiffs for a crime they did not commit.

Nonetheless, to the extent that the Court has found the prosecutors absolutely immune from liability with respect to Plaintiffs' § 1983 claims, that same immunity extends to any potential liability of the Defendants under § 1985. *White v. Bloom*, 621 F.2d 276, 280 (8th Cir. 1980) (finding that absolute immunity on a § 1983 claim extends to a § 1985 claim). To the extent, however, that the Court has found that the prosecutors are not entitled to absolute immunity on Plaintiffs' claims of lack of probable cause to arrest and fabrication/coercion of evidence, Plaintiffs have sufficiently pled a § 1985 claim on those bases, and the prosecutors are not entitled to absolute immunity therefor.

c. *State law claims.*

With regards to Plaintiffs' state law claims of False Arrest and Imprisonment (McGhee only), Intentional Infliction of Emotional Distress, and Loss of Parental Consortium (Harrington only), the prose-

cutor Defendants argue that Iowa courts use a modified Imbler approach in determining whether absolute immunity will shield a prosecutor from state law claims. Defendants cite *Gartin v. Jefferson County*, 281 N.W.2d 25 (Iowa Ct. App. 1979), for the proposition that Iowa courts have extended absolute immunity to actions taken by prosecutors in their administrative or investigative role. The *Gartin* court wrote: "[*Imbler*] did not present an occasion to consider whether the policy reasons for granting immunity to the judicial aspects of the prosecutorial function also require immunity for those aspects of a prosecutor's responsibility which are administrative or investigative in nature." *Gartin*, 281 N.W.2d at 29. After *Gartin* was decided, however, the United States Supreme Court clearly took up the issue of whether absolute immunity protects administrative or investigative functions of prosecutors and concluded that it did not. *See, e.g., Burns*, 500 U.S. at 492-96 (absolute immunity not applicable when prosecutor advised police). Indeed, the Iowa Supreme Court recently recognized this fact in *Beck v. Phillips*, 685 N.W.2d 637 (Iowa 2004), when it denied absolute immunity to a prosecutor for acts it deemed as administrative and not "intimately associated with the judicial phase of the criminal process." *Beck*, 685 N.W.2d at 645.[14] It appears, then, that Iowa courts use precisely the same absolute immunity analysis

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[14] Defendants also cite *Hike v. Hall*, 427 N.W.2d 158 (Iowa 1988), in support of their position that a different absolute immunity analysis is applicable under Iowa law. *Hike* was decided in 1988, well before *Burns* was decided in 1991 and *Buckley I* was decided in 1993. The Court believes that the law used by the Iowa Supreme Court in *Beck* is the appropriate application under Iowa law, and that it mirrors federal law on the issue.

as do the federal courts, and as is mandated by the United States Supreme Court in *Imbler*, *Buckley I*, *Burns*, and other like decisions. Defendants argument, therefore, that they should be provided with absolute immunity against Plaintiffs' state law claims fail for the same reasons it fails to protect them from many of Plaintiffs' federal claims.

For the reasons stated herein, the Court finds that Defendants' activities in arresting Plaintiffs without probable cause and coercing/fabricating witness testimony all took place prior to the point at which the prosecutor Defendants began acting as advocates, and thus, they are entitled, at best, to qualified immunity. The acts of the prosecutors in filing the True Information, in coercing/fabricating jailhouse informant testimony, in actually presenting even fabricated or perjured evidence at trial, and in failing to produce or reveal exculpatory evidence, however, are part of the prosecutors function as an advocate, and are, therefore, entitled to absolute immunity.

2. Matthew Wilber.

The analysis of absolute immunity regarding Matthew Wilber's actions in 2003 is necessarily different from the analysis regarding Richter and Hrvol. Like the other Defendants, Wilber admits all of the facts (for purposes of this motion), and thus concedes the allegations against him (notably made only by McGhee), i.e., that he knew he had no probable cause to pursue a case against either Harrington or McGhee; that he intimidated and coerced Hughes to get him to revert to his 1977 version of events and essentially recant his recantation of his 1977 testimony; that he threatened and intimidated Hughes to get him to take the Fifth Amendment so

that he could claim that Hughes was "unavailable" as a witness and rely on the transcript of Hughes' 1978 trial testimony; and that he intentionally misrepresented some facts and concealed others to mislead McGhee and his attorney into believing that he had a strong case against McGhee to convince McGhee to take a plea to second-degree murder.

There is one primary difference between the actions of Wilber and those of Hrvol and Richter, however. While a reasonable jury could conclude that Hrvol and Richter never had probable cause to even arrest the Plaintiffs, at the time of Wilber's investigation and alleged reprehensible acts, McGhee stood convicted for the 1977 first-degree murder of John Schweer. It seems certain that in light of the fact that the Iowa Supreme Court had vacated Harrington's sentence for the prosecution's concealment of exculpatory evidence, that McGhee could have petitioned the Iowa courts to have his sentence and conviction vacated on the same basis. It is also reasonable to conclude that Wilber necessarily would have reviewed all of the 1977-78 information gathered in the case, and potentially interview witnesses and conduct his own review of the evidence to determine whether any cause existed to resist such a motion by McGhee, or to determine whether he possessed sufficient evidence to retry either Harrington or McGhee. Importantly, however, during the time that Wilber conducted his investigation and review of the evidence, McGhee was still serving his sentence under his 1978 conviction for the first-degree murder of John Schweer, that is, his conviction had not been vacated by the Iowa Supreme Court as had Harrington's.

Harrington's sentence was vacated by the Iowa Supreme Court on April 18, 2003. *See Harrington v. State*, 659 N.W.2d 509 (Iowa 2003). On September 2, 2003, McGhee signed a letter agreement with Wilber and the Pottawattamic County Attorney's Office providing that McGhee would enter an *Alford* plea to murder in the second degree and be sentenced to 25 years, with credit for time served. It was agreed in the plea arrangement that the Pottawattamie County Attorney's Office would stipulate to the granting of McGhee's pending motion for summary judgment in his habeas proceedings, and indeed, summary judgment was entered in favor of McGhee and a state court judge vacated his 1978 sentence and granted him a new trial on September 2, 2003. McGhee appears to be seeking § 1983 damages for Wilber's actions taken between April 18, 2003 and September 2, 2003. McGhee also appears to be seeking § 1983 damages for Wilber's actions taken between September 2, 2003 and the date McGhee entered a plea to second-degree murder on October 23, 2003. This Court has previously held that any damages McGhee could assert under § 1983 as arising or flowing from his conviction on October 23, 2003 are barred by the *Rooker-Feldman* doctrine.

With regard to Wilber's allegedly unlawful actions between the time Harrington's 1978 conviction was vacated and the time that McGhee's sentence was vacated, McGhee offers no evidence or law that would support a causal link between Wilber's conduct and any constitutional deprivation McGhee may have experienced. "Liability under § 1983 requires a causal link to, *and direct responsibility for*, the deprivation of rights" protected by the Constitution. *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990) (emphasis added); *see also Gordon v. Hansen*,

168 F.3d 1109, 1113 (8th Cir. 1999) ("Section 1983 . . . requires a causal relationship between a Defendants' conduct and a plaintiff's constitutional deprivation. Absent such a relationship, the defendant is entitled to dismissal." (citations omitted)). Between April 18 and September 2, 2003, the only cause of McGhee's incarceration was the fact of his 1978 conviction and life sentence for the first-degree murder of John Schweer. To the extent that McGhee argues that Wilber knew that he was entitled to dismissal during that time frame, McGhee offers no law demonstrating an affirmative responsibility of Wilber to concede to McGhee's request to have his sentence and conviction vacated simply because Harrington's sentence and conviction were vacated. Indeed, even to the extent that Wilber may have realized through his review of the 1977-78 evidence and through his own investigation into the matter that he had no probable cause to retry McGhee for Schweer's murder, it is clear that Wilber's actions were part and parcel of his role as the Pottawattamie County prosecutor and that such actions were taken in furtherance of that role.

Defendants Richter and Hrvol cited to *Reasonover v. St. Louis County*, 477 F.3d 569, 579-80 (8th Cir. 2006), for the proposition that a prosecutor is immune from liability for interviewing witnesses because that function is prosecutorial rather than investigatory. The Eighth Circuit in *Reasonover* found that "[not all of an advocate's work is done in the courtroom. For a lawyer to properly try a case, he must confer with witnesses, and conduct some of his own factual investigation." With regard to Hrvol and Richter, the facts of *Reasonover* were distinguishable. The prosecutor in *Reasonover* only had the role of prosecuting the case. He did not partici-

pate in fabricating evidence and interviewed witnesses only after they had been brought to him by the police, as opposed to seeking out and interviewing witnesses himself. See *id.* at 577 ("Police working independently on Lyner's case later brought Lyner to the prosecutor, Goldman, because Lyner told the police she had information about the Buckley murder."). Likewise, other cases cited by Hrvol and Richter distinguish their cases from Wilber's. In *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988), the prosecutors again were not charged with acting in an investigatory rather than an advocatory manner because the alleged wrongful conduct, disclosure of defamatory material, was done "during judicial proceedings." *Lewellen*, 843 F.2d at 1113. And in *Anderson v. Larson*, 327 F.3d 762 (8th Cir. 2003), the prosecutor was alleged to have communicated with an informant in violation of rules governing attorney conduct. *Anderson*, 327 F.3d at 768. In *Anderson*, however, the communication took place after police had brought the informant to the prosecutor, and the prosecutor, himself, only prepared a cooperation agreement with the informant. *Id.* at 765. There was no allegation that the prosecutor personally undertook any activity that could have been deemed investigatorial, unlike Richter and Hrvol in the present case. *Id.*

Unlike Richter and Hrvol, Wilber's review of the 1977-78 evidence, his interviewing of witnesses who testified in 1978, and any alleged bad acts that he may have taken in performing those functions, were necessary to his determination of whether to resist McGhee's request for summary judgment in his habeas proceedings and to determine whether a retrial of either Harrington or McGhee would be possible. Additionally, Wilber's investigation into Schweer's

murder, and any unlawful acts he may have taken in relation thereto, could also reasonably be said to have been taken to bring a conclusion to the matter, either by stipulating to McGhee's request to vacate his sentence, by determining whether retrial was feasible, or by fashioning a plea arrangement with McGhee. Regardless of which of the three formed the basis for Wilber's actions, each is intimately associated with the prosecutor's function as a prosecutor and thus would warrant absolute immunity. See *Myers*, 810 F.2d at 1446 (finding that a "prosecutor's activities in the plea bargaining context" warrant absolute immunity) (citing *Taylor v. Kavanagh*, 640 F.2d 450, 453 (2d Cir. 1981) (rejecting absolute immunity despite misrepresentations made during the negotiation of a plea arrangement)).[15]

With regard to Wilber's allegedly wrongful actions after McGhee's conviction was vacated on September 2, 2003, the record shows that McGhee was

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[15] To the extent McGhee argues that Wilber had no probable cause, and thus could not be entitled to absolute immunity under Buckley I, the Court must disagree. A grand jury indictment, even if based on unreliable or perjured testimony, establishes the existence of probable cause as a matter of law. See Edmond v. United States Postal Serv. Gen. Counsel, 949 F.2d 415, 419 (D.D.C. 1991); Willis v. Cool, 546 F. Supp. 458, 463 (D. Mo. 1982). While this case represents a unique procedural posture, it would seem reasonable to extrapolate that McGhee's conviction, by a jury of his peers, evaluating his guilt by the standard of "beyond a reasonable doubt" would also, at a minimum, support probable cause for Wilber to have begun reevaluating the evidence in the case as part of his prosecutorial functions. To conclude that Wilber had to start the probable cause analysis anew before he could review the 1977-78 evidence in determining an appropriate course of action would defy logic and is without any precedential authority.

released on bond, but was subject to various conditions which, according to McGhee, constituted a further deprivation of his constitutional rights. Further, McGhee claims that Wilber misrepresented, concealed, and manipulated the evidence between September 2, 2003 and the date his plea was accepted on October 23, 2003. These claims against Wilber also must fail under the doctrine of absolute immunity. First, any alleged deprivation of liberty Plaintiff alleges stemmed solely from the fact that, after his 1978 conviction was vacated, he remained charged and was subject to retrial for Schweer's murder. Wilber is absolutely immune for bringing charges against McGhee and for any alleged damages that may have arisen from the charge. See *Imbler*, 424 U.S. at 424-28 (finding prosecutor absolutely immune for "initiating a prosecution"). Further, to the extent that Wilber allegedly withheld exculpatory evidence and misrepresented or lied about inculpatory evidence to wrongfully induce McGhee into going through with his plea to a charge of second-degree murder, such acts were undertaken in his role as a prosecutor attempting to either prepare for a retrial or to conclude a plea arrangement. See *Myers*, 810 F.2d at 1446. Finally, to the extent that Wilber is accused of lying to the state court judge regarding whether the Minutes of Testimony against McGhee could be proven, such misrepresentations, omissions, or lies occurred during the course of a judicial proceeding (the plea hearing), and are protected by absolute immunity. *See, e.g., Burns*, 500 U.S. at 490-91 (prosecutor absolutely immune for actions at probable cause hearing); *Brodnicki*, 75 F.3d at 1266 (finding prosecutor entitled to absolute immunity when acting as an advocate for the state in a criminal prosecution). Because the Court finds that

Wilber was at all times acting in his role as a prosecutor, and was at all stages of the proceedings undertaking the functions of an advocate, Wilber is entitled to absolute immunity with regard to both McGhee's state and federal claims.[16]

B. Qualified Immunity

Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted). In considering whether an official may rely on qualified immunity to escape civil liability, the Court measures the objective legal reasonableness of the unconstitutional act against the clearly established law at the time of the action. *Anderson v. Creighton*, 483 U.S. 635, 639 (1986) (citing *Harlow*, 457 U.S. at 819). Qualified immunity, however, does not provide government officials with a "license to lawless conduct." *Harlow*, 457 U.S. at 819. "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate. . ., [b]ut where an official's du-

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[16] The Court notes that this analysis does not apply to McGhee's claim of defamation against Wilber. That claim will be discussed in a later part of this order. Additionally, McGhee's claims against Pottawattamie County, to the extent it is claimed liable for Wilber's actions on an indemnity theory, must also be dismissed as an extension of Wilber's absolute immunity. See *Schenecker v. City of Sioux City*, 107 F.3d 662, 664 (8th Cir. 1997) (finding that prosecutorial immunity on a § 1983 claim extends to the county employer) (citing *Burr v. City of Cedar Rapids*, 286 N.W.2d 393, 396 (Iowa 1979)).

ties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id.* (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). Essentially, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The qualified immunity analysis is a two-step process. *Sexton v. Martin*, 210 F.3d 905, 909 (8th Cir. 2000). The Court must first determine whether Plaintiffs have "asserted a violation of a constitutional or statutory right." *Id.* (citations omitted). Next, the Court looks at whether that right was clearly established at the time the alleged unlawful act occurred. *Id.* at 909 (citation omitted). For a right to be clearly established, the law must give the official "fair warning" that his or her conduct would violate an individual's rights when the action was taken. *Hope v. Pelzer*, 536 U.S. 730, 731 (2002). In making its inquiry, the Court is reminded that state officers who "seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Butz v. Economou*, 438 U.S. 478, 506 (1978).

1. Richter and Hrvol.

a. *Plaintiffs' Section 1983 claims.*

Defendants make no argument or citation with regard to Plaintiffs' claims that they were arrested without probable cause. With regard to the allegation that Richter and Hrvol sought arrest of the Plaintiffs without probable cause, it is plain that

"[t]he Fourth Amendment right of citizens not to be arrested without probable cause is indeed clearly established." *Kuehl*, 173 F. 3d at 649. Ample law predating Schweer's murder demonstrates that the right to be free of such a constitutional violation was clearly established at the time Harrington and McGhee were arrested. *See, e.g., Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (holding that no private citizen may be subject to arrest unless "the facts and circumstances within [the knowledge of law enforcement] and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable cause in the belief that 'an offense has been or is being committed'"). As the Court has previously concluded that a reasonable jury could find that Defendants acted without probable cause in their arrest and pursuit of Plaintiffs, the Court must deny qualified immunity on this portion of Plaintiffs' § 1983 claim. See *Womack v. City of Bellefontaine Neighbors*, 193 F.3d 1028 (1999) (police officers not entitled to qualified immunity where they disregarded plainly exculpatory evidence in their probable cause evaluation).

With regard to the Defendants' claim that they are entitled to qualified immunity for concealing or failing to turn over *Brady* evidence, the Court finds the argument moot in light of its earlier conclusion that Richter and Hrvol are entitled to absolute immunity on the issue. With regard to Defendants' claim that they are entitled to qualified immunity for fabricating/coercing evidence, the Court preliminarily notes that Defendants' concession of all facts alleged by Plaintiffs is insufficient to carry their burden of proof on their entitlement to qualified immunity. See *Mahers v. Harper*, 12 F.3d 783, 785 (8th Cir. 1993) ("Qualified immunity is an affirmative de-

fense, so Defendants have the burden of pleading and proving the defense."). Defendants cite only one case, *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994) (hereinafter referred to as "*Buckley II*"), supporting their asserted position that Richter and Hrvol are entitled to qualified immunity for bad acts taken even in an investigatory capacity, including coercing and coaching witness testimony, and paying or promising leniency to witnesses in exchange for false testimony. Because the Court has already concluded that Hrvol and Richter are entitled to absolute immunity for all bad acts alleged to have occurred after the True Information against Plaintiffs was filed (including coercing jailhouse informant testimony and concealing exculpatory evidence), the Court limits its analysis to whether Hrvol and Richter are entitled to qualified immunity for its pre-True Information coercion of witnesses and fabrication of evidence.

In the Seventh Circuit's *Buckley II* decision, a criminal capital murder defendant, Buckley, had the charges against him dismissed after his first trial resulted in a hung jury, and after a retrial was unable to commence due to the death of the prosecution's primary witness. See *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1234-35 (7th Cir. 1990) (referenced in the 1994 *Buckley II* decision as providing the factual background for the case). Buckley served three years in prison because he had been unable to post bond, and eventually brought a § 1983 action contending "that almost everyone connected with the investigation and prosecution violated his constitutional rights and should be made to pay damages." *Id.* at 1235. In his complaint against the prosecutors and police, Buckley "narrate[d] a tale of coercive interrogations in 1983 and 1984 by police and prosecutors,

arm-twisting of experts that led them to 'find' similarities between his shoes and the bootprint, misleading presentations to the grand jury, indictment, and stubborn refusal to dismiss the case despite [another person's] confession." *Id.* at 1236. In attempting to parse out Buckley's allegations, the Seventh Circuit found that his accusations boiled down to a claim that prosecutors repeatedly interrogated witnesses and paid them for statements implicating Buckley, coerced witnesses, and should have known that witness accusations of Buckley were "obviously false." *Buckley II*, 20 F.3d at 794.

In concluding that Buckley had not had his constitutional rights violated, the Seventh Circuit found that the "persons aggrieved" by the prosecutor's coercion of witnesses were the witnesses themselves, not Buckley. *Id.* "Overbearing tactics violate the right of the person being interrogated to be free from coercion. Buckley cannot complain that the prosecutors may have twisted Cruz's arm, any more than he can collect damages because they failed to read Cruz *Miranda* warnings. . . . Rights personal to their holders may not be enforced by third parties." *Id.* at 794-95. Defendants urge the Court to follow *Buckley II* and find that Plaintiffs have not asserted a violation of their own constitutional or statutory rights, such that Defendants should receive qualified immunity on their claims of fabricating and coercing evidence.

The Court finds the *Buckley II* decision unpersuasive,[17] and finds that Plaintiffs' claims that the

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[17] It is worth noting that the *Buckley II* decision is a Seventh Circuit disposition, and is, therefore, not binding on this Court in the first instance.

prosecutors manufactured, coerced, and fabricated evidence against them is sufficient to state a substantive due process claim. Substantive due process is violated where the state's deprivation of certain fundamental liberty interests is so shocking to the conscience that no amount of procedural safeguards could pass constitutional muster. See *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (finding a substantive due process claim "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."). In *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001), a case cited by Defendants in their reply brief to emphasize that the Court should adopt the Seventh Circuit's *Buckley II* analysis, authorities were investigating the brutal murder of a woman in Aurora, Missouri. *Wilson*, 260 F.3d at 949. Just days after the murder, Wilson was interviewed by police twice, but consistently stated that he had been shopping with his mother at the time of the crime. *Id.* Law enforcement also focused their investigation on another young man, Gary Wall, because he seemed to know certain details of the crime before those details had been made public. *Id.* Authorities knew that Wall was slightly mentally impaired and that he was a "very skilled liar." *Id.* Wall told authorities that Wilson had confessed to him that he had committed the crime. *Id.* Despite concerns over Wall's credibility, police picked up Wilson under false pretenses and interrogated him about the murder. *Id.* They told Wilson that Wall had implicated him in the murder, and over the course of a four hour interrogation, eventually elicited a "collection of discombobulated facts about the murder [which evolved] into a confession." *Id.* Wilson even-

tually entered an *Alford* plea to avoid the death penalty on a murder charge and spent more than nine years in prison. *Id.* After conducting an independent investigation, the Governor of Missouri granted Wilson a full pardon, finding that it was "clear he did not commit the crime for which he has been incarcerated." *Id.* Wilson brought a § 1983 claim against the officers, alleging, amongst other things, that they violated his Fourteenth Amendment Due Process rights by coercing a false inculpatory statement from Wall and using this unreliable, manufactured evidence against him. *Id.* at 950. The district court denied a motion for summary judgment by police on the basis of qualified immunity. *Id.*

The police argued to the Court of Appeals that Wilson had failed to state a cognizable claim under the Seventh Circuit's *Buckley II* decision, because he was attempting to assert the constitutional rights of a third party. *Id.* at 954. The Court rejected the claim, finding that the "district court correctly noted that this claim is not an attempt by Wilson to assert Wall's rights, but rather a claim that the appellants knowingly used false or unreliable evidence (the coerced statement from Wall) against Wilson at his criminal proceedings." *Id.* "If officers use false evidence, including false testimony, to secure a conviction, the defendant's due process is violated." *Id.* (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Defendants here would have the Court believe that the Eighth Circuit *Wilson* decision endorsed the *Buckley II* approach, because it "acknowledged and did not reject" it. Defs.' Reply Br. at 10. On the contrary, the Eighth Circuit merely found *Buckley II* to be inapposite "because the Defendants were prosecutors who enjoyed absolute immunity for conduct *at trial*." *Wilson*, 260 F.3d at 955 n.6 (emphasis added)

(noting that "[t]he [*Buckley II*] court reasoned that since the violation, if any, to the plaintiff occurred when the statements were introduced at trial the Defendants were [absolutely] immune").

The Eighth Circuit's *Wilson* decision demonstrates the insufficiency of *Buckley II* to provide sufficient clarity as to whether the prosecutors in that case manufactured evidence while acting as advocates or as investigators. As a general matter, immunity may apply to the former, but not the latter. Indeed, Judge Fairchild, in his *Buckley II* dissent, implied that the majority based their opinion on the conclusion that the prosecutors merely "consulted a number of witnesses to find support for their theory," when in fact, reading Buckley's complaint as a whole, it alleged that the prosecutors actually manufactured bootprint evidence and suborned perjury. *Buckley II*, 20 F.3d at 800 (Fairchild, J., dissenting). In rejecting the majority's conclusion, Judge Fairchild stated:

> I respectfully disagree with the majority's conclusion that "the location of the injury is dispositive . . . for the bootprint evidence and the allegedly coerced confessions alike." As I understand the "location of the injury" concept, it is that because a wrongful act does not ripen into a § 1983 cause of action until it causes an impairment of a constitutional right, a prosecutor is not liable for the result of his wrongful act, not within the scope of advocacy, where the immediate cause of the impairment is an act as to which the prosecutor is immune. Here, however, the claim is not only that the prosecutors caused injury by using fabricated or perjured evidence in

> seeking indictment and at trial, but it seems to be that there would not have been either an indictment or trial if some of the prosecutors had not fabricated evidence and suborned perjury.

Id. (internal citation omitted). While agreeing that a prosecutor whose only contribution to Buckley's loss of liberty was the use of even manufactured evidence at trial, the dissenting judge concluded that the prosecutors should not be immune from § 1983 liability "for their non-advocacy wrongful conduct if Buckley can prove that indictment and trial would not have occurred in the absence of the product of the wrongful conduct." *Id.* "Subornation of perjury is not advocacy and prosecutors are not immune from liability even though the conduct did not ripen into a § 1983 cause of action except by use of the perjured testimony at trial." *Id.*

Reading *Buckley II* together with *Wilson*, the Court finds it difficult to reconcile Defendants' proposition that a prosecutor who at trial uses false evidence that he, himself, manufactured would be immune from liability when a police officer that manufactures false evidence, subsequently used by a prosecutor at trial, would be liable. The Second Circuit Court of Appeals attempted to resolve this apparent contradiction in *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000). In *Zahrey*, the Second Circuit Court of Appeals denied qualified immunity to a prosecutor who allegedly fabricated evidence against a criminal defendant, identifying the right at issue as "the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity." *Zahrey*, 221 F.3d at 349. The *Zahrey* court found that "the right

at issue is a constitutional right, provided that the deprivation of liberty of which [the § 1983 plaintiff] complains can be shown to be the result of the [prosecutor's] fabrication of evidence." *Id.* The court found that where a prosecutor was both accused of fabricating evidence and subsequently using that fabricated evidence at trial, resulting in the plaintiff's incarceration, the liberty deprivation was directly linked to the fabrication of evidence while the prosecutor was acting in an investigatory capacity, such that the prosecutor could not be shielded from liability for the initial act of fabricating evidence. *Id.* at 353-54. This was true even though the prosecutor's act of actually using the fabricated testimony at trial was shielded by absolute immunity:

> If [the prosecutor] had fabricated evidence and handed it to another prosecutor who unwittingly used it to precipitate [the plaintiff's] loss of liberty, the prosecutor would be liable for the initial act of fabrication. It would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty. If, as alleged, Coffey fabricated evidence in his investigative role, it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that *Zahrey* would be indicted and arrested. The complaint adequately alleges that the deprivation of *Zahrey*'s liberty was the legally cognizable result of Coffey's alleged misconduct in fabricating evidence.

Id. at 353-54 ("Deeming the chain of proximate causation broken by the prosecutor's use of evidence he himself fabricated would also, in practical effect, enlarge the scope of the prosecutor's absolute immunity."). The *Zahrey* court recognized the tension between its decision and that of the Seventh Circuit in Buckley II:

> We recognize that this conclusion is in tension, if not conflict, with the majority opinion by Judge Easterbrook for the Seventh Circuit in [*Buckley II*]. In [*Buckley II*], which had facts similar to those alleged here, Judge Easterbrook concluded that the plaintiff had failed to state a claim, even though he "unquestionably suffered a loss of liberty when he was arrested and imprisoned pending trial." He reasoned that a prosecutor violates no constitutional right of a defendant by unlawfully obtaining testimony from a potential trial witness that is known to be false. He acknowledged that a prosecutor using such false testimony at trial could violate the defendant's constitutional rights, but noted that for this act the prosecutor enjoyed absolute immunity. We agree with Judge Easterbrook (just as we agree with Judge Preska in the pending case) that the investigatory act of obtaining evidence known to be false is not itself a violation of a constitutional right. But we disagree with the further point that no valid section 1983 claim is stated where a deprivation of liberty results from the initial act of obtaining evidence known to be false, at least in a case like [*Buckley II*] and the pending case where the same person who fabricated the evidence foreseeably used it.

We cannot be certain whether the Seventh Circuit rejected Buckley's claim on the ground that the prosecutor's investigatory misconduct did not violate any constitutional right or on the legally distinct ground that the prosecutor's investigatory misconduct was not the legally cognizable cause of the plaintiff's ultimate deprivation of liberty. Several statements in the three Seventh Circuit opinions in the *Buckley* litigation emphasize the issue of causation. The rationale for the Seventh Circuit's final decision in [*Buckley II*] appears to be squarely grounded on the theory that the prosecutor's alleged misconduct in fabricating evidence was not the cause of a liberty deprivation. Discussing a prior decision in *Jones v. City of Chicago,* 856 F.2d 985 (7th Cir. 1988), which had sustained a claim against a police officer who misled a prosecutor by presenting false evidence, Judge Easterbrook wrote:

> Things would be different [i.e., no cause of action], we implied [in *Jones*], . . . if the prosecutors themselves had concocted the evidence, for then the immunized prosecutorial decisions [to use the evidence] would be the cause of the injury.

Judge Fairchild dissented on this point. We do not see the implication in *Jones* that Judge Easterbrook observes, and, even if it were evident, we would follow the contrary decisions of the Fifth Circuit in *Thomas* and our own decision in *White,* and would con-

> sider Judge Fairchild's dissent in [*Buckley II*] persuasive.

Id. at 354-55 (some internal citations omitted).

In *Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984), a decision cited by the *Zahrey* court, the defendant in a § 1983 action was a mayor who was also ex officio a magistrate and municipal judge. *Thomas*, 734 F.2d at 187. The mayor signed a criminal complaint against the local university's president, and then, in his capacity as magistrate, issued a warrant for the president's arrest and set bond. *Id.* While the actions of the mayor in his judicial capacity as magistrate were found to be shielded by judicial immunity, his actions in investigating and swearing out the criminal complaint were not, as such acts were not part of a magistrate's judicial function. *Id.* at 189-90. In rejecting the mayor's argument that he could not be held liable under § 1983 because his investigatory acts did not "result in 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States,'" the Fifth Circuit found that issuance of the warrant did not break the chain of causation between the early un-immunized acts and the later immunized acts:

> Sams did not choose to present the complaint to an impartial intermediary. He deliberately avoided doing so, despite the availability of state judges and justices of the peace who had authority to sign the warrant. Under these circumstances the issuance of the arrest warrant was not an intervening cause: There was no "independent decision" to break the causal chain and to insulate him as the initiating party. Sams acted with "personal animosity, malice, and a lack of good faith" in

> undertaking the acts that enabled him to take up his magistrate's pen and sign the warrant. He may not innoculate his conduct by that pen-stroke.

Id. at 191. The Court finds the reasoning of *Zahrey* and *Thomas* compelling and adopts the reasoning contained therein in its conclusion that the prosecutors' alleged fabrication/coercion of evidence caused Plaintiffs' deprivation of liberty by denying them due process, despite the fact that the prosecutors' acts of using the fabricated/coerced evidence *at trial* is shielded by absolute immunity. *Wilson*, 260 F.3d at 954 ("If officers use false evidence, including false testimony, to secure a conviction, the defendant's due process is violated."). Plaintiffs have, therefore, asserted a cognizable violation of their own constitutional or statutory rights.

This holding squares well with *Moran v. Clarke*, a 2002 Eighth Circuit Court of Appeals decision. 296 F.3d 638 (8th Cir. 2002) (en banc). In that case, Moran, a St. Louis police officer, sued the St. Louis Board of Police Commissioners and various police officials and officers, alleging malicious prosecution and violation of his substantive due process rights. *Id.* at 639. The case arose after Moran was charged with felony assault, misdemeanor assault, and conspiracy to hinder prosecution in regards to a struggle with a mentally impaired teenager. *Id.* at 641. Moran was acquitted of all criminal charges and thereafter brought his civil claim. *Id.* at 642. In determining whether Moran had adequately stated a substantive due process violation under § 1983, the Court pointed out that "[t]he Fourteenth Amendment guarantees 'substantive due process which prevents the government from engaging in conduct that

shocks the conscience or interferes with rights implicit in the concept of ordered liberty.'" *Id.* at 643 (citing *Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir. 1998)). "To that end, the Fourteenth Amendment prohibits 'conduct that is so outrageous that it shocks the conscience or otherwise offends "judicial notions of fairness, or is offensive to human dignity."'" *Id.* (internal citations and quotations omitted).

Thus, to the extent that Defendants urge that their conduct in fabricating and coercing witness testimony is not shocking to the conscience, such that they should be entitled to qualified immunity, the Court must disagree. In analyzing whether the conduct at issue is sufficiently egregious to deny qualified immunity, it is well established that "[m]ere negligence is never sufficient. Proof of intent to harm is usually required, [and] in some cases, proof of deliberate indifference, an intermediate level of culpability, will satisfy this substantive due process threshold." *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) ("[We] have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. . . . It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.")). Moran, much like the Plaintiffs in the present case, claimed in regard to his due process claim that police engaged in a purposeful conspiracy to manufacture, and did in fact, manufacture false

evidence against him to falsely formulate a pretense of probable cause. *Id.* at 647. In concluding that he had stated a cognizable due process violation, the court held: "Although the Fourth Amendment covers seizures, which would be satisfied by Moran's arrest, law enforcement's intentional creation of damaging facts would not fall within its ambit." *Id.* Noting that "acts arising out a defendant's deliberate indifference will not sustain a substantive due process claim, 'conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.'" *Id.* (quoting *Lewis*, 523 U.S. at 849).

On the issue of whether the right allegedly violated was clearly established, the Court also must conclude that it was. To be clearly established, there need not be a case decided on all fours with the present factual circumstances. *Vaughn v. Ruoff*, 253 F.3d 1124, 1130 (8th Cir. 2001). Rather, it need only be apparent from pre-existing law that the conduct is unlawful. *Anderson*, 483 U.S. at 640. Long before the violations alleged in the present case, the Supreme Court determined that presenting fabricated testimony to a jury is a violation of a criminal defendant's right to a fair trial. *See Napue*, 360 U.S. at 270 ("The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (stating due process is "a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty

through a deliberate deception of court and jury by the presentation of testimony known to be perjured.").[18] Accordingly, the Court concludes that Plaintiffs' claims that their rights to due process of law were violated by the prosecutors' fabrication/coercion of witness testimony while acting in their investigatorial capacity is cognizable and was well-established at the time of the alleged violations.

b. *Plaintiffs' section 1985 conspiracy claim.*

Just as with Plaintiffs' § 1983 claims, the Court concludes that, to the extent it has found the prosecutors absolutely immune from liability with respect to Plaintiffs' § 1983 claims, that same immunity extends to any potential liability of the Defendants under § 1985. *White v. Bloom*, 621 F.2d at 280. To the extent, however, that the Court has found that the prosecutors are not entitled to either absolute or qualified immunity (probable cause and fabrication/coercion of evidence), Defendants are not immune from liability on Plaintiffs' § 1985 claim. Additionally, Plaintiffs have sufficiently pled a § 1985 claim on those bases.

2. Brown and Larsen.

Defendants Brown and Larsen, the police investigating Schweer's murder in 1977 and 1978, claim that they are entitled to qualified immunity on Plaintiffs' claims against them for arresting them without probable cause, concealing exculpatory evidence, and for fabricating/coercing evidence. See Clerk's No. 90 in Harrington (Larsen, Brown and

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[18] Both *Napue* and *Mooney* were cited in *Wilson*, 260 F.3d at 954-55.

City of Council Bluffs' Motion for Partial Judgment on the Pleadings); Clerk's No. 100 in McGhee (Larsen, Brown and the City of Council Bluffs' Motion for Judgment as a Matter of Law).

a. *Section 1983 claims.*

First, with regard to the Plaintiffs' claim that their right to not be arrested without probable cause was violated, the Court has previously found with regard to Richter and Hrvol that Plaintiffs have asserted a cognizable violation of a constitutional right that was clearly established at the time of their arrest. The reasoning articulated *supra* applies to the officers here in question, and no further analysis is necessary to deny qualified immunity on this claim. With regard to Defendants' claim that McGhee's 2003 conviction for the second-degree murder of John Schweer established probable cause as a matter of law, this Court previously declined to adopt Defendants' position and declines to change its reasoning in regard to the present motions.[19]

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[19] In its previous ruling, the Court stated the following:

> The difficulty with Plaintiff's position relates to his allegations that the various defendants acted without probable cause. In *Williams v. Sharlo*, 93 F.3d 527 (8th Cir. 1996), the Eighth Circuit Court of Appeals rejected a § 1983 claim founded on a lack of probable cause on the basis that the § 1983 plaintiff's "guilty plea forecloses a section 1983 claim for arrest without probable cause." *Id.* at 528-29, see also *Howell v. Tanner*, 650 F.2d 610, 615 n.6 (5th Cir. 1981) (a conviction conclusively establishes that an arrest was made with probable cause), *Shkrobut v. Chicago*, No. 04C8051, 2005 WL 2787277, at *2 (N.D. Ill. Oct. 24, 2005) ("A criminal conviction based upon a guilty plea conclusively establishes for purposes of a subsequent civil proceeding that the defendant engaged in the criminal act for which he was convicted"); *Pa-*

dro v. Heffelfinger, 110 F.R.D. 333 (E.D. Pa.1986) (guilty plea sufficient to establish probable cause for arrest and, therefore, Plaintiff cannot establish a Section 1983 claim as to lack of probable cause for the arrest). Thus, for purposes of issue preclusion, it could reasonably be said that the issue of probable cause is identical in the two actions. McGhee argues, however, that his plea and ultimate conviction in 2003 were fraudulently obtained. This is so, McGhee claims, because the only part of the Minutes of Testimony that incriminated McGhee stemmed from the testimony of Kevin Hughes, which testimony Hughes recanted the day before McGhee's plea hearing. Indeed, McGhee alleges that Wilber was entirely aware of Hughes' recantation, but nonetheless represented to the court at the plea hearing that the Minutes of Testimony were true, correct and provable. *See* Restatement of Torts § 667 ("The conviction of the accused by a magistrate or trial court although reversed by an appellate tribunal, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means.").

In *Haring v. Prosise*, the Supreme Court reviewed "the principles governing our determination whether a § 1983 claimant will be collaterally estopped from litigating an issue on the basis of a prior state-court judgment." 462 U.S. 306, 313 (1983). Noting that the full faith and credit statute, 28 U.S.C. § 1738, "generally requires 'federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so,'" the Court pointed out, however, that a state-court judgment will nonetheless not be given collateral estoppel effect where "'the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.'" *Id.* (quoting *Allen v. McCurry*, 449 U.S. 90, 96, 101 (1980)). "Moreover, additional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights.'" *Id.* at 313-14 (quoting *Allen*, 449 U.S. at 101). Thus, "[i]f the state courts would not give preclusive effect to the prior judgment, 'the courts of the United States can accord it no greater effi-

The Court next turns to Plaintiffs' allegation that Larsen and Brown concealed exculpatory evidence, including eight police reports that contained information about an alternative suspect, and concealed the fabrication/coercion of witness testimony. Defendants concede that Plaintiffs have stated a valid constitutional claim under *Brady*, but argue that in 1977-78, there was no law that would arguably place a law enforcement officer on notice that failing to turn over exculpatory evidence could be a constitutional deprivation. Thus, Defendants argue that the constitutional right was not well-established at the time it was violated. The Court must agree.

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cacy' under § 1738." *Id.* at 314 nn. 6,7 (noting additional exceptions, such as when "'special circumstances warrant an exception to the normal rules of preclusion'" or when "'controlling facts or legal principles have changed significantly since the state-court judgment.'" (citations omitted)).

McGhee asserts that this is precisely the type of situation where Iowa courts would not give preclusive effect to the probable cause finding established by McGhee's guilty plea, in light of the fact that Wilber did not inform either McGhee or the court of conviction that Kevin Hughes had recanted his testimony implicating McGhee in the murder of John Schweer. Hence, the state court was essentially "unable" to protect McGhee's federal rights due to Wilber's fraudulent conduct. The Court agrees. "A fraudulent concealment of facts which would have caused the judgment not to have been rendered will constitute extrinsic fraud under Iowa law." *Bradley v. Board of Trustees of Washington Township*, 425 N.W.2d 424, 425 (citing *Scheel v. Superior Mfg. Co.*, 89 N.W.2d 377, 384 (1958)). Extrinsic fraud is necessary to vacate a judgment under Iowa law, and when it is present, "the use of res judicata rules may be suspended." *Id.* at 425. In light of Iowa law on this type of situation, the Court does not believe that the Iowa courts would give preclusive effect to the issue of probable cause, even if that issue is fundamentally the same in both the state and federal cases.

In *Clemmons v. Armontrout*, Nos. 05-4140, 06-1099, 2007 WL 438768 (8th Cir. Feb. 12, 2007), the Eighth Circuit Court of Appeals affirmed that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Clemmons*, 2007 WL 438768, at * 3 (citing *Brady*, 373 U.S. at 87). The Court also stated, however, "that while '[t]he *Brady* doctrine imposes an absolute duty on the prosecutor to produce all materially favorable evidence in the State's possession,' the Court 'has never imposed this absolute duty on law enforcement officials other than the prosecutor.'" *Id.* (quoting *Villasana v. Wilhoit*, 368 F.3d 976, 979 (8th Cir. 2004)).

Plaintiffs cite *Villasana* for the proposition that police are not protected by qualified immunity when they withhold material, exculpatory evidence in bad faith, i.e., with the intent of depriving the defendant of a fair trial. McGhee's Resistance to Defs.' Motion for Judgment as a Matter of Law at 6. In *Villasana*, the question presented was whether laboratory technicians could receive qualified immunity for failing to disclose test documents to either the prosecutor or a criminal defendant. *Villasana*, 368 F.3d at 977. The Court found that the lab technicians were not entitled to qualified immunity, but that they were nonetheless not subject to liability for a *Brady* violation because *Brady* has never been held to extend to laboratory technicians an obligation to disclose exculpatory evidence to the prosecutor or a defendant. *Id.* *Villasana*'s discussion of liability of police officers for failing to disclose *Brady* evidence, however, noted that those cases that have extended liability to police for failure to disclose exculpatory evidence have all

been based on "claims of intentional or bad faith failure to disclose *Brady* material to the prosecutor or to the defense." *Id.* at 980 (emphasis added). This finding is consistent with a long line of cases that have imposed liability on police only when they fail to turn exculpatory evidence over to the defense *and* the prosecutor. See *Mowbray v. Cameron County*, Tx., 274 F.3d 269, 278 (5th Cir. 2001) ("[O]ur research reveals [] no case extending *Brady* to police officers or lab technicians."); *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001) (under a qualified immunity analysis, concluding that it was clearly established in 1979 and 1980 that police could not withhold from prosecutors exculpatory information); *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000) (en banc) (declining to extend liability to police for failure to disclose exculpatory evidence "[b]ecause police knowledge is plainly imputed to the prosecution for purposes of the prosecutor's *Brady* duties, the prosecutor bears the responsibility for implementing procedures designed to ensure that police officers turn over all evidence to him.") (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)); *McMillian v. Johnson*, 88 F.3d 1554, 1567 (11th Cir. 1996) (although investigators have no *Brady* obligation to turn over exculpatory evidence to the defense, they have a duty, under *Brady*, to turn over such evidence to the prosecutor); *Jones*, 856 F.2d at 993 (in § 1983 case, upholding jury verdict against defendant police officers on ground that jury could have found defendants concealed from prosecutors facts material to decision whether to prosecute plaintiff).

In the present case, Plaintiffs' Complaints do not allege that Larsen and Brown failed to turn over exculpatory information to the *prosecutors*. Indeed, the Complaints repeatedly make clear the assertion that

the prosecutors were present during much of the coercion of witnesses and fabrications of testimony, as well as that they were aware of every alleged unlawful activity performed by Larsen and Brown. *See* Complaints (making numerous references to Richter and Hrvol being fully aware of every bad act alleged in the case. For example: "Richter and . . . Hrvol worked closely with Brown, Larsen and the rest of the Council Bluffs Police Department during the investigation of the Schweer murder. Both participated in witness interviews before any arrests were made."; "Richter and Hrvol had access to all the reports generated during the Schweer murder investigation"; "the 1977 defendants [including Richter and Hrvol] knew that Hughes was a liar. But they were desperate to give the appearance of solving the Schweer case. They 'worked with' Hughes to create a case. . ."; "Hrvol, Larsen and Brown went to . . . interview Anthony Houston"; "Defendants [including Richter and Hrvol] knew they needed other witnesses to 'corroborate' at least some of the false story they manufactured with Hughes"; "Defendants changed Hughes's story . . ."; "The 1977 Defendants knew their whole case against Harrington and McGhee was the coerced and coached statement of Hughes . . ."; "the 1977 defendants resorted to a notorious source of false evidence . . ." ; "the 1977 Defendants continued to conceal information . . .").

Plaintiffs have not identified a single case where, as here, the prosecutors were aware of all exculpatory information, but police officers were nonetheless held liable for failing to turn that material over to the criminal defendants. Accordingly, the Court must conclude that Plaintiffs have failed to assert the violation of a constitutional or statutory right (to have police turn exculpatory evidence over to them).

Defendants Larsen and Brown are, therefore, entitled to qualified immunity on Plaintiffs' claims that their rights were violated by the failure of Larsen and Brown to turn over *Brady* evidence to them. Likewise, any potential claim by Plaintiffs that the police Defendants are liable for continuing to withhold *Brady* material after Plaintiffs were convicted is without merit. First, as already found, Larsen and Brown were never under a duty to disclose any *Brady* materials to the Plaintiffs because the prosecutors knew of all of the exculpatory evidence and it was the prosecutors' duty to turn it over to the Plaintiffs. Thus, Plaintiffs have not asserted a cognizable violation of a constitutional or statutory right. Second, to the extent that Brown and Larsen are claimed to have lied about the existence of exculpatory evidence during Plaintiffs' post-conviction relief hearings, such testimony is shielded from liability under the doctrine of absolute immunity. See *Briscoe v. LaHue*, 460 U.S. 325, 345 (1983) (in context of whether police officer should be given immunity for trial testimony, the Court found: "[T]he principles [of prior cases in granting absolute immunity] to protect judges and . . . prosecutors also apply to witnesses."); *Conley v. Office of the Pub. Defender*, 653 F.2d 1241, 1242 (8th Cir. 1981) (witnesses are absolutely immune from section 1983 suit arising from their testimony in judicial proceedings).

With regard to Plaintiffs' allegations that Larsen and Brown coerced witness testimony and fabricated evidence, the Court must deny qualified immunity on the same basis it did so with regard to prosecutors Richter and Hrvol. Plaintiffs have adequately alleged that Larsen and Brown actively coerced and coached witness testimony for the purpose of arresting them without due process and for the purpose of

denying them their rights to a fair trial. The allegations are sufficiently conscience-shocking to state a substantive due process violation that was clearly established at the time the alleged violation occurred.

b. *Section 1985 conspiracy claim.*

For the same reasons and to the same extent as Richter and Hrvol, the Court finds that where no immunity, either absolute or qualified, exists for these defendants, liability may lie on Plaintiffs' § 1985 claims.

3. Matthew Wilber.

Because the Court has concluded that Wilber was, at all times, acting in his capacity as a prosecutor, and is thus entitled to absolute immunity for all claims, save the defamation claim against him, the Court need not evaluate whether Wilber is entitled to qualified immunity.

4. David Dawson.

As with Wilber, the causes of action asserted against Dawson are claimed only by McGhee, and not by Harrington. Dawson, at Wilber's request, was assigned to work full time on the reinvestigation of the Schweer murder in 2003, following the vacation of Harrington's sentence by the Iowa Supreme Court. McGhee's Complaint makes the following allegations concerning Dawson. Dawson interrogated Hughes on April 24, 2003, at Wilber's direction. At that interview, Hughes, without *Miranda* warnings and fearing he would lose his job if he didn't return to work soon, claimed that he had lied at Harrington's 2000 post-conviction relief hearing when he said that his testimony at Plaintiffs' 1978 trials was false. Plater told Dawson in an April 2003 interview that Plater denied that McGhee ever told him he was

with Harrington when Schweer was killed. Dawson reviewed the file for the 1963 murder for which Gates was a suspect, noting in his report that Omaha police had done a records check on Gates in connection to a 1963 murder, records which indicated "Safe Keeping in connection with Assault with Gun (Mental) dated 6-22-55." Dawson taped a purportedly biased interview with Gates on April 25, 2003, wherein Gates admitted that he may have walked his dogs in the area of the murder, and denied ever wearing bib overalls. Gates also failed to answer Dawson's question regarding where he was on the night of the murder. Dawson did not personally reveal this information to counsel for Plaintiffs, though Wilber is alleged to have known all of these facts.

As the Court concluded *supra* in regards to Wilber, McGhee offers no evidence or law that supports a causal link between Dawson's conduct and any constitutional deprivation McGhee may have experienced. *See Madewell*, 909 F.2d at 1208 ("Liability under § 1983 requires a causal link to, and direct responsibility for, the deprivation of rights" protected by the Constitution) (emphasis added); *Gordon*, 168 F.3d at 1113 ("Section 1983 . . . requires a causal relationship between a Defendants' conduct and a plaintiff's constitutional deprivation. Absent such a relationship, the defendant is entitled to dismissal."). Between April 18 and September 2, 2003, the only cause of McGhee's incarceration was the fact of his 1978 conviction and life sentence for the first-degree murder of John Schweer, matters in which Dawson was never involved. Regarding the time frame between the vacating of McGhee's conviction on September 2, 2003, and the entry of his plea on October 24, 2003, the record does not articulate any actions by Dawson whatsoever. Finally, any claim for dam-

ages alleged by McGhee to have arisen from his October 2003 conviction are barred by the *Rooker-Feldman* doctrine. Because there is no causation between Dawson's actions and any deprivation suffered by McGhee, McGhee has failed to state an actionable claim against Dawson.

Moreover, "[p]rosecutors and their assistants also enjoy immunity from section 1983 actions so long as the actions complained of appear to be within the scope of prosecutorial duties." *Keating v. Martin*, 638 F.2d 1121, 1122 (8th Cir. 1980). "This immunity is equally available to investigators for the state prosecutor for actions in connection with a criminal prosecution." *Lawyer v. Kernodle*, 721 F.2d 632, 636 (8th Cir. 1983) (citing *Keating*, 638 F.2d at 1122); *see also Ireland v. Tunis*, 113 F.3d 1435, 1446 (6th Cir. 1997) ("[A] nonjudicial officer who takes ministerial actions intimately related to the judicial process pursuant to the express direction and control of a prosecutor, who is directing the activity in fulfillment of a quasi-judicial responsibility, also has absolute immunity.") (quoting *Joseph v. Patterson*, 795 F.2d 549, 560 (6th Cir. 1986) (abrogated on a different issue)); *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 n.5 (9th Cir. 1989) ("Investigators, employed by a prosecutor and performing investigative work in connection with a criminal prosecution, are entitled to the same degree of immunity as prosecutors."). Because none of Dawson's actions are alleged by McGhee to have been made in any way other than by the direction of Wilber, Dawson is entitled to the same level of

immunity as is Wilber, i.e., absolute immunity as to all of McGhee's claims.[20]

C. Sovereign Immunity

1. Richter and Hrvol.

Richter and Hrvol assert that they are shielded from liability on Plaintiffs' state law claims under the Iowa Tort Claims Act ("ITCA"). Both Plaintiffs raise a claim of intentional infliction of emotional distress against Richter and Hrvol; McGhee asserts claims of false arrest and imprisonment against both Richter and Hrvol; and Harrington asserts a claim of loss of parental consortium, on behalf of his daughter, against both Richter and Hrvol.

"The doctrine of sovereign immunity dictates that a tort claim against the state or an employee acting within the scope of his office or employment with the state must be brought, if at all, pursuant to chapter 669." *Dickerson v. Mertz*, 547 N.W.2d 208, 213 (Iowa 1996). Iowa Code section 669.23 provides: "Employees of the state are not personally liable for any claim which is exempted under [Iowa Code] section 669.14." Section 669.14 provides that the State's waiver of sovereign immunity from tort claims in section 669.4 does not apply to certain types of claims (i.e., sovereign immunity is not waived), in-

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[20] Dawson would also be entitled to qualified immunity with regard to any claims of failure to turn over exculpatory evidence for the same reasons that Larsen and Brown are entitled to such immunity. Additionally, McGhee's claims against the City of Council Bluffs, to the extent it is claimed liable for Dawson's actions on an indemnity theory, must also be dismissed as an extension Dawson's immunity. *See Schenecker*, 107 F.3d at 664 (finding that prosecutorial immunity on a § 1983 claim extends to the county employer) (citing *Burr*, 286 N.W.2d at 396).

cluding: "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

Defendants cite the unpublished disposition of Judge Longstaff in *Anderson v. Larsen*, No. 1:00-cv-10012 (S.D. Iowa March 28, 2002) (Clerk's No. 44), in support of their claim that the ITCA bars Plaintiffs' state law claims. In *Anderson*, the plaintiffs, a Shelby County attorney and his wife, sued three law enforcement officers and the Shelby County Attorney, alleging various § 1983 violations, and state law claims of false arrest, false imprisonment, malicious prosecution, and intentional infliction of emotional distress, amongst others. *Anderson*, No. 1:00-cv-10012, at 1-7. In finding that the limited waiver of sovereign immunity granted by the ITCA was inapplicable, and that the defendants were immune from being sued, Judge Longstaff stated: "The gravamen of all of plaintiffs' remaining claims in this case are for false arrest, malicious prosecution and abuse of process. This case is similar to Hawkeye By-Products where the gravamen of the plaintiffs' complaint was misrepresentation, and therefore excepted from the waiver of sovereign immunity." *Id.* at 16 (citing *Hawkeye By-Prods. Inc. v. Iowa*, 419 N.W.2d 410 (Iowa 1988)).

Defendants argue that because all of Plaintiffs' state law claims against them are at their root claims for false arrest, false imprisonment, malicious prosecution, and abuse of process, the limited waiver of liability under the ITCA is inapplicable and Richter and Hrvol are immune from prosecution on Plaintiffs' claims of false arrest, loss of parental consortium, and intentional infliction of emotional dis-

tress. Plaintiffs urge that Defendants' argument suffers from one fatal flaw, that is, that the ITCA is not implicated in this case because Plaintiffs' claims are filed against municipalities and not against the State of Iowa. Plaintiffs also note that in Harrington's defamation action against Wilber, the current Pottawattamie County Attorney, Wilber argued that he was entitled to immunity under the Iowa Municipal Tort Claims Act ("IMTCA"), and not the ITCA. Defendants counter that county attorneys should be considered state employees for purposes of the ITCA because "it would make no sense to insulate the Attorney General under the State Tort Claims Act and relegate a county attorney to the protections of the municipal tort claims act when they both act for the same entity in prosecuting the crime on behalf of the state of Iowa." Defs.' Reply at 11. Defendants cite *Iowa v. Gill*, 143 N.W.2d 331, 332 (Iowa 1966) ("It is the duty of the county attorney to appear for the state in the courts of his county when the state is a party."), in support of this proposition.

The issue is a difficult one, and not addressed by any existing Iowa case law. Nonetheless, the Court is convinced that Iowa courts would find a prosecutor acting to uphold the state's criminal laws to be protected by the ITCA. In upholding the State of Iowa's prohibition against murder, it is clear that a county attorney represents first and foremost the interests of the state, such that they could be deemed state actors under the ITCA. This conclusion is supported by *Trobaugh v. Sondag*, 668 N.W.2d 577 (Iowa 2003). In *Trobaugh*, a county attorney signed an initial complaint against a defendant. That same county attorney then took a "position as an assistant public defender in the same county" and became the defendant's defense attorney. *Trobaugh*, 668 N.W.2d at

579. Ultimately, the Iowa Supreme Court concluded that the ITCA did not bar relief because the claims alleged against the attorney (now the county's public defender) were not the functional equivalent of claims barred by the ITCA. *Id.* at 585. Nowhere did the Court find that the county defender was not a state employee in the first instance. Further, Iowa Code § 669.2 provides that, as used in the ITCA, an "employee of the state" includes:

> any one or more officers, agents, or employees of the state or any state agency, including members of the general assembly, *and persons acting on behalf of the state or any state agency in any official capacity,* temporarily or permanently in the service of the state of Iowa, whether with or without compensation, but does not include a contractor doing business with the state. Professional personnel, including physicians, osteopathic physicians and surgeons, osteopathic physicians, optometrists, dentists, nurses, physician assistants, and other medical personnel, who render services to patients or inmates of state institutions under the jurisdiction of the department of human services or the Iowa department of corrections, and employees of the department of veterans affairs, are to be considered employees of the state, whether the personnel are employed on a full-time basis or render services on a part-time basis on a fee schedule or other arrangement. Criminal defendants while performing unpaid community service ordered by the district court, board of parole, or judicial district department of correctional services, or an inmate providing services pursuant to a chapter 28E

> agreement entered into pursuant to section 904.703, and persons supervising those inmates under and according to the terms of the chapter 28E agreement, are to be considered employees of the state.

Iowa Code § 669.2(4) (emphasis added). The language of § 669.2(4) makes clear that being on the State of Iowa payroll is not a prerequisite to being an "employee of the state" for purposes of the ITCA.

> Additionally, Iowa Code § 331.756 provides that a county attorney shall:
>
> 1. Diligently enforce or cause to be enforced in the county, *state laws* and county ordinances, violations of which may be commenced or prosecuted in the *name of the state*, county, or as county attorney, except as otherwise provided.
>
> 2. Appear *for the state* and the county in all cases and proceedings in the courts of the county *to which the state* or the county is a party, except actions or proceedings resulting from a change of venue from another county, and appear in the appellate courts in all cases in which the county is a party, and appear in all actions or proceedings which are transferred on a change of venue to another county or which require the impaneling of a jury from another county and in which the county or the state is a party.
>
> 10. Make reports relating to the duties and the administration of the county attorney's office to the governor when requested by the governor.

11. Cooperate with the auditor of state to secure correction of a financial irregularity as provided in section 11.15.

17. Institute legal proceedings against persons who violate laws administered by the division of labor services of the department of workforce development as provided in section 91.11.

18. Investigate complaints and prosecute violations of child labor laws as provided in section 92.22.

19. Prosecute violations of employment security laws and rules as provided in section 96.17, subsection 2.

20. Assist, at the request of the director of revenue, in the enforcement of cigar and tobacco tax laws as provided in sections 453A.32 and 453A.49.

24. Prosecute, at the request of the director of the department of natural resources or an officer appointed by the director, violations of the state fish and game laws as provided in section 481A.35.

25. Assist the department of public safety in the enforcement of beer and liquor laws as provided in section 123.14. The county attorney shall also prosecute nuisances, forfeitures of abatement bonds, and foreclosures of the bonds as provided in sections 123.62 and 123.86.

Iowa Code § 331.756 (selected entries only, emphasis added). It appears, then, that State law, outlined in § 331.756 anticipates that a County Attorney, though

technically an employee of the particular county for which he is elected or by which he is employed, will necessarily perform many functions *on behalf of the state* or on *behalf of a state agency*.[21] Such actions

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[21] Countless other duties are imposed on County Attorneys by state law, and demonstrate that County Attorneys will frequently act on behalf of the state or on behalf of a state agency. Further examples include:

29. At the request of the director of public health, commence legal action to enjoin the unlawful use of radiation-emitting equipment as provided in section 136C.5.

31. Prosecute violations of the Iowa veterinary practice Act as provided in section 169.19.

32. Assist the department of inspections and appeals in the enforcement of the Iowa food code and the Iowa hotel sanitation code as provided in sections 137F.19 and 137C.30.

33. Institute legal procedures on behalf of the state to prevent violations of chapter 9H or 202B.
34. Prosecute violations of the Iowa dairy industry laws as provided in section 179.11.

35. Prosecute persons who fail to file an annual or special report with the secretary of agriculture under the meat and poultry inspection Act as provided in section 189A.17.

36. Cooperate with the secretary of agriculture in the enforcement of label requirements for food packages as provided in section 191.7.

37. Prosecute violations of the Iowa commercial feed law as provided in section 198.13, subsection 3.

38. Cooperate with the secretary of agriculture in the enforcement of the agricultural seed laws as provided in section 199.14.

39. Prosecute violations of the Iowa fertilizer law as provided in section 200.18, subsection 5.

40. Prosecute violations of the Iowa drug, device, and cosmetic Act as requested by the board of pharmacy examiners as provided in section 126.7.

41. Provide the Iowa department of corrections with information relating to the background and criminal acts committed by each person sentenced to a state correctional institution from the county as provided in section 904.202.45. Appear on behalf of the administrator of the division of mental health and disability services of the department of human services in support of an application to transfer a person with mental illness who becomes incorrigible and dangerous from a state hospital for persons with mental illness to the Iowa medical and classification center as provided in section 226.30.

49. Prosecute violations of law relating to the family investment program, medical assistance, and supplemental assistance as provided in sections 239B.15, 249.13, and 249A.14.

50. Commence legal proceedings to enforce the rights of children placed under foster care arrangements as provided in section 233A.11.

51. Commence legal proceedings, at the request of the superintendent of the Iowa juvenile home, to recover possession of a child as provided in section 233B.12.

52. Furnish, upon request of the governor, a copy of the minutes of evidence and other pertinent facts relating to an application for a pardon, reprieve, commutation, or remission of a fine or forfeiture as provided in section 914.5.

55. At the request of the state geologist, commence legal proceedings to obtain a copy of the map of a mine or mine extension as provided in section 456.12.

59. Assist, upon request, the department of transportation's general counsel in the prosecution of violations of common carrier laws and regulations as provided in section 327C.30.

66. Represent the state in litigation relating to the inheritance tax if requested by the department of revenue as provided in section 450.1.

are parts of the County Attorney's *official functions*, as designated by Iowa law, and the Court believes that the ITCA was designed to protect such functions performed for or on behalf of the State of Iowa. *See* Iowa Code § 13A.1 (defining "prosecuting attorney" as including "county attorney . . . or any attorney charged *with responsibility of prosecution of violation of state laws*") (emphasis added); *see also* 27 C.J.S. *District and Prosecuting Attorneys* § 22 (2007) ("The prosecuting attorney may act as either county or state officers. The prosecuting attorney represents the state in the realm of law enforcement, and when acting in his prosecutorial capacity to enforce state penal law, the district attorney is an agent of the state, not of the county in which the criminal case happens to be prosecuted."); *see also Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997) ("Texas law makes clear . . . that when acting in the prosecutorial capacity to enforce state penal law, a district attorney is an agent of the state, not of the county in which the criminal case happens to be prosecuted."); *Coleman v. Kaye*, 87 F.3d 1491, 1499 (3d Cir. 1996) (prosecutors can have "a duel or hybrid status. . . . [When] enforcing their sworn duties to enforce the law . . ., they act as agents of the state. . . ."); *Baez v. Hennessy*, 853 F.2d 73, 77 (2d. Cir. 1988) ("When prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the State not the county.").

Having concluded that Richter and Hrvol could be considered state employees under the ITCA for

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71. Assist, as requested by the attorney general, with the enforcement of the Iowa competition law as provided in section 553.7.

Iowa Code § 331.756 (selected entries only).

their prosecution of murder charges against Plaintiffs, the Court must now turn to evaluate to what extent the ITCA is applicable to Plaintiffs' state law claims in the first instance. A "claim" under the ITCA is defined as:

> a. Any claim against the state of Iowa for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state *while acting within the scope of the employee's office or employment*, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death.
>
> b. Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee's office or employment.

Iowa Code § 669.2(3)(a)-(b) (emphasis added). The term "acting within the scope of the employee's office or employment" means "acting in the employee's line of duty as an employee of the state." Iowa Code § 669.2(1). While neither party discusses the import of these provisions of the ITCA, the Court believes they are important in the present case. The ITCA does not apply to claims that a state employee "acted outside his official duties." *See Lindaman v. Bode*, 478 N.W.2d 312, 316 (Iowa Ct. App. 1991). Given that this Court has previously found that Richter and Hrvol were not acting in the scope of their duties as prosecutors when they arrested Plaintiffs without

probable cause, or when they coerced and coached witnesses and fabricated evidence prior to the filing of the True Information, it is reasonable to conclude that those investigatory activities could arguably be deemed to have been taken outside the "scope of their employment" as prosecutors of state criminal violations. Thus, liability may still be imposed against Defendants on Plaintiffs' state law claims to the extent those claims arise from acts taken outside the scope of Defendants' activities as state employees, because the ITCA is not applicable.

To the extent, however, that Plaintiffs' seek liability on their state law claims for the Defendants' concealment of exculpatory evidence, the Court's prior holding that these actions were taken in the prosecutors' roles as advocates mandates a different conclusion, because these activities clearly were within the scope of their prosecutorial duties. As noted previously, a citizen's right to sue a "an employee of the state" under the Iowa Tort Claims Act "is limited by conditions set forth by the legislature in chapter 669." *Drahaus v. State*, 584 N.W.2d 270, 272 (Iowa 1998). Of particular importance here is the exception for "[a]ny claim *arising out of* assault, battery, *false imprisonment, false arrest, malicious prosecution, abuse of process*, libel, slander, misrepresentation, deceit, or interference with contract rights." Iowa Code § 669.14(4) (emphasis added). Clearly, under the plain language of the statute, Richter and Hrvol, as Iowa employees, are shielded from liability for McGhee's "false arrest and imprisonment" claim, to the extent it arises from their concealment of exculpatory evidence. With regard to the intentional infliction of emotional distress claims and Harrington's consortium claim, however, the Court must look further than the plain language of the

statute to determine whether the claims "aris[e] out of" false imprisonment, false arrest, malicious prosecution, or abuse of process, i.e., the Court must evaluate whether "[t]he gravamen of plaintiff's claim . . . is the functional equivalent" of one of the causes of action listed in § 669.14. *See Greene v. Friend of Court*, 406 N.W.2d 433, 436 (Iowa 1987) (noting that § 669.14 "identifies excluded claims in terms of the type of wrong inflicted"); *see also Hawkeye By-Prods., Inc.*, 419 N.W.2d at 411.

In his claim on behalf of his daughter, Nicole Antoinette Harrington, for loss of parental consortium, Harrington references all of the allegations previously made against Defendants and notes that were it not for those things, "there would not have been a scintilla of evidence of Harrington's culpability for Schweer's murder." Harrington Compl. at ¶ 387. Hence, without the bad acts of the Defendants, and without the "wanton disregard for the rights, needs, and feelings of Nicole Antoinette Harrington," Nicole Harrington would not have suffered the loss of her father's consortium for the period of his incarceration. *Id.* at ¶ 392. Likewise, both Plaintiffs claim that Defendants intentionally inflicted emotional distress on them via their outrageous conduct demonstrated through all of the allegations made previously against Defendants. The Court finds it difficult to fathom how these claims are not, at their core, claims "arising out of" false arrest, malicious prosecution, abuse of process, or false imprisonment. As in *Hawkeye By-Products* and *Anderson*, the gravamen of Plaintiffs' state law claims against the prosecutors is that they were falsely arrested, falsely imprisoned, and maliciously prosecuted, and that without Defendants abuse of process, no intentional infliction of emotional distress or loss of parental

consortium would have occurred. These claims against the prosecutors, therefore, to the extent they arise from Hrvol and Richter's concealment of exculpatory evidence, are barred by the ITCA.[22] [23]

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[22] Plaintiffs argue that Defendants "have talked out of both sides of their mouth" on the issue of whether Hrvol and Richter are protected by the ITCA or the IMTCA, by virtue of the fact that this Court previously analyzed Wilber's liability for defamation against Harrington under the IMTCA. They point out that it is "established as the law of this case . . . that when analyzing whether sovereign immunity precludes any of the Plaintiff's claims, we look to the statutory language of the Iowa Municipal Tort Claims Act, not the Iowa Tort Claims Act." Harrington's Resistance at 105. The question of whether a state law claim against a government agent is protected by the IMTCA or the ITCA is one of state law, however, and Plaintiffs offer no authority whatsoever for the proposition that because this Court previously evaluated *Wilber's* liability under the IMTCA, notably *because that is the issue that the parties submitted to the Court*, that the Court is somehow forever barred from considering the applicability of other provisions of state law. Indeed, though the issue has not been argued, it is entirely possible that Defendants' prosecutorial duties are covered by the ITCA, but other duties and functions of the Defendants are covered instead by the IMTCA.

[23] In Larsen and Brown's Motions for Partial Judgment on the Pleadings and Motion for Judgment as a Matter of Law, they argue with regard to Plaintiffs' state law tort claims:

> The District Court for the Southern District of Iowa has addressed this issue in a closely analogous case raising these same theories of recovery. *See Anderson v. Larson*, No. 1-00-cv-10012, Doc. No. 44. . . . Because the arguments advanced by Co-Defendants Hrvol, Richter, Wilber and Pottawattamie County concerning the application of the Order in the *Anderson* case apply with equal force to these Defendants, that portion of the Brief in support of Co-Defendants' summary judgment motion addressing this issue (pp. 25-27) is incorporated herewith by reference.

D. Qualified Privilege (Regarding McGhee's Defamation Claim against Wilber)

In Count 23 of his Complaint, McGhee alleges defamation against Matthew Wilber, for statements made by Wilber at a press conference on October 24, 2003. The entire press release is reprinted *supra* in the Court's statement of facts, however, only the last portion relates to McGhee. The allegedly defamatory portions of the statement are italicized:

> On a related note, Curtis McGhee, a co-defendant of Mr. Harrington's in this case, *pleaded no contest* today to a charge of Second Degree Murder for the death of John Schweer. Mr. McGhee was sentenced to a term of imprisonment of twenty-five years. Since Curtis McGhee had already served more than twenty-five years in prison since his original conviction in 1978, he was credited with time served and left the courthouse late this morning. Even though Mr. McGhee

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Motions at 8. The Court first points out that Defendants' repeated "incorporation by reference" has constituted something of a nuisance in this case. While there are many similarities between the claims against the various Defendants, the theories advanced to avoid liability necessarily require a different analysis concerning the prosecutor Defendants, the police Defendants, and the municipal Defendants, respectively. Yet the police and municipal defendants' incorporation by reference of a defense proffered by the prosecutor defendants is simply not helpful to the Court without some argument regarding how the prosecutor defense is applicable to the police or municipal Defendants. Because Defendants Larsen and Brown have utterly failed to offer any evidence or argument indicating how the ITCA is applicable to them, the Court declines to review the matter further.

> did not actually pull the trigger on the gun that killed John Schweer, *our case against him was stronger than against Terry Harrington. Mr. McGhee had made admissions to at least three different people about being with Terry Harrington when Harrington shot a police officer in Council Bluffs.* Those statements would likely not be admissible in a trial against Terry Harrington, but *would certainly have come into evidence at a trial against Mr. McGhee.* Mr. McGhee was offered a chance to plead to Second Degree Murder back in 1978 and, had he taken that deal back then, he would probably have been paroled over ten years ago.

McGhee argues that these portions of Wilber's announcement are defamation per se because: 1) McGhee did not plead "no contest" to a charge of second degree murder, but rather took an *Alford* plea, during which he maintained his innocence; 2) Wilber knew that the case against McGhee was equally as weak as the case against Harrington; 3) Wilber knew that two of the three witnesses who claimed McGhee had confessed to being present at the Schweer murder had recanted their stories, and Wilber himself had found the third witness to be not credible; and 4) the statements of the two persons who claimed McGhee had confessed would not come into evidence at trial because those two people had recanted, and the third person's testimony could not reasonably come in at trial because Wilber did not find the witness credible. McGhee argues that even viewing all of the evidence Wilber had available to him, there was nothing to support Wilber's claims that the case against McGhee was stronger than the case against Harrington, that McGhee had made

admissions, or that such evidence would come into evidence in a retrial of McGhee.

Defendant does not argue that the statements on their face are not defamation per se.[24] Rather he argues that he had a qualified privilege to make such statements, and that McGhee cannot demonstrate a genuine issue of material fact to show that Wilber in fact entertained serious doubts as to whether the statements were true.

There can be little doubt on the present facts, viewed in the light most favorable to the non-moving party, that McGhee has raised a genuine issue of material fact that all of the italicized statements of Wilber are libelous or slanderous per se. Moreover, the question of whether the statements were truthful is sufficiently debatable to give rise to a jury ques-

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[24] Defamation, which includes the twin torts of libel and slander, is the "'malicious publication, expressed either in printing or in writing [or orally in the case of slander], or by signs and pictures, tending to injure the reputation of another person or to expose [the person] to public hatred, contempt, or ridicule or to injure [the person] in the maintenance of [the person's] business.'" *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 115 (Iowa 1985) (quoting *Plendl v. Beuttler*, 111 N.W.2d 669, 670-71 (Iowa 1961)). Certain statements may qualify as being libelous or slanderous per se. This means:

> [The statements] are actionable in and of themselves without proof of malice, falsity or damage. In actions based on language not libelous per se, all of these elements must be proved . . . before recovery can be had, but when a statement is libelous [or slanderous] per se they are presumed from the nature of the language used.

Id. at 115-16 (quoting *Vojak v. Jensen*, 161 N.W.2d 100, 104 (Iowa 1968)). Thus, words are defamation per se if it can be presumed as a matter of law that their conveyance will have a libelous or slanderous effect.

tion. *See Jones v. Palmer Commc'ns, Inc.*, 440 N.W.2d 884, 891 (Iowa 1989) (noting that substantial truth is an absolute defense in a defamation action); *but see Kelly*, 372 N.W.2d at 295 (the truth or falsity of a statement does not affect the determination whether the statement is libelous per se).

Wilber argues first that his case against McGhee was, in fact, stronger than his case against Harrington. This is true, Wilber claims, because McGhee admitted lying to police about his whereabouts on the night of the murder, he asked a friend to lie for him, and McGhee admitted that he was with Harrington the night of the murder. Even assuming that these facts are true, the Court cannot say that they make a "stronger case" for murder, particularly when they do not place either McGhee or Harrington anywhere near the murder scene. Indeed, reviewing all the evidence known to Wilber, articulated *supra* in the Court's recitation of facts, a reasonable jury could find that the statements were not substantially true.

With regard to the Wilber's claim that McGhee confessed to three witnesses that he was involved in Schweer's homicide and his statement that such testimony would be admissible at trial against McGhee, Wilber claims that the three witnesses did testify on at least one occasion that McGhee was involved. Wilber claims that even though two of the three witnesses recanted their stories, and the third was viewed as incredible, the inculpatory statements had never been excluded from evidence by a court. Wilber's argument is without merit. A reasonable jury could view Wilber's statement as implying that, on the day of the press conference, those three witnesses were ready to testify at trial that McGhee

made inculpatory statements to them, when in fact, that was not the case.[25]

This Court made extensive findings about the availability of the qualified privilege defense in Harrington's companion case, Iowa Southern District #4:03-cv-90616 (Clerk's No. 29), published at *Harrington v. Wilber*, 353 F. Supp. 2d 1033 (S.D. Iowa 2005). The court found that the attachment of qualified privilege was appropriate, but that a genuine issue of material fact had been raised as to whether the qualified privilege should be defeated on the basis that a reasonable jury could find that the defamatory statements were made with actual malice. *See Harrington v. Wilber*, 353 F. Supp. 2d 1033, 1045 (S.D. Iowa 2005) ("'A qualified privilege is a defeasible immunity from liability; that is, a qualified privilege may be defeated under certain circumstances.' Such circumstances may arise when the privilege is abused or if the defamatory remarks were made with actual malice.") (quoting *Barreca v. Nickolas*, 683 N.W.2d 111, 116 (Iowa 2004); and citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)). Just as in *Harrington*, there is ample evidence from which a jury could conclude that Wilber acted with a knowing or reckless disregard for the truth when he stated that McGhee pleaded "no contest"; stated that he had a stronger case against McGhee; stated that McGhee had confessed to three witnesses to his involvement in the Schweer murder; and stated that such evidence would be admissible at trial against McGhee. And just as in *Harrington*, these issues are

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[25] With regard to Wilber's statement that McGhee pleaded "no contest," Defendant makes no argument that the statement is substantially true.

more than ample to raise a genuine issue of material fact as to whether Wilber acted with actual malice in his allegation that Harrington murdered John Schweer. The Court finds no reason to sway from its holding in *Harrington*, and incorporates the reasoning contained therein by reference in denying Wilber's claim for summary judgment on McGhee's defamation claim.

E. Pottawattamie County's Request for Summary Judgment on the Claim of Failure to Supervise and Train Prosecutors

In Harrington's Complaint in Counts 1, 2, and 3, and McGhee's Complaint in Counts 16 and 29, they assert § 1983 claims against Pottawattamie County for failing to train and supervise the prosecutors not to commit the alleged misdeeds forming the basis of their other § 1983 claims. The Defendant County argues first that the State of Iowa is liable for the Plaintiffs' claims, and that the County cannot be held liable for the acts of the prosecutor in enforcing state laws. The Plaintiffs counter that it is the County that must answer for the improper conduct of Hrvol and Richter in their handling of Plaintiffs' cases.

Plaintiffs have alleged that Pottawattamie County failed to train and supervise its employees and that it is the policy or custom of the Pottawattamie County Attorney's Office to arrest and prosecute persons without probable cause, to intimidate and coach witnesses to give false testimony, and to conceal exculpatory evidence. Plaintiffs have also alleged that the County's policy or custom of discriminating against African Americans was a motivating force in this unconstitutional misconduct.

In *Speer v. City of Wynne, Arkansas*, 276 F.3d 980, 985 (8th Cir. 2002), Speers filed a claim against a city's mayor, its Deputy Prosecuting Attorney, and the city itself, alleging they violated his § 1983 procedural due process rights. *Speer*, 276 F.3d at 982. The district court entered judgment against the City, but found judgment in favor of the mayor. *Id.* at 984. On appeal, the City argued that the district court erred in holding it liable for a violation of Speer's due process rights on the theory that the district court made no underlying finding that the mayor had violated Speer's constitutional rights. *Id.* at 984. The City claimed that under *Los Angeles v. Heller*, 475 U.S. 796, a finding of liability must be made on an underlying city employee to impose municipal liability. *Id.* at 985. The Eighth Circuit rejected the claim, holding:

> Our court has previously rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability. *See Praprotnik v. City of St. Louis*, 798 F.2d 1168, 1172-73 n.3 (8th Cir. 1986), *rev'd on other grounds*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988); see also *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable."). As our court noted in *Praprotnik*, a crucial fact underlying the Supreme Court's decision in *Heller* was that the theory of municipal liability asserted was entirely dependent on the municipal defendants' responsibility for the officer's alleged unconstitutional acts. *See Praprotnik*, 798

F.2d at 1173 n.3. A favorable verdict for the individual officer, therefore, would have been entirely inconsistent with a finding that the municipal defendants were responsible for the unconstitutional behavior. *Heller* should not be read to require a plaintiff to show more than that a governmental policy or custom was the "moving force" that led to the deprivation of his constitutional rights, the foundation for municipal liability recognized by the Court in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L. Ed. 2d 611 (1978).

The appropriate question under *Heller* is whether a verdict or decision exonerating the individual governmental actors can be harmonized with a concomitant verdict or decision imposing liability on the municipal entity. The outcome of the inquiry depends on the nature of the constitutional violation alleged, the theory of municipal liability asserted by the plaintiff, and the defenses set forth by the individual actors. We do not suggest that municipal liability may be sustained where there has been no violation of the plaintiff's constitutional rights as a result of action by the municipality's officials or employees. *Cf. Trigalet v. City of Tulsa*, 239 F.3d 1150, 1156 (10th Cir. 2001) (concluding that a municipality may be held liable only if the conduct of its employees directly caused a violation of a plaintiff's constitutional rights); *Schulz v. Long*, 44 F.3d 643, 650 (8th Cir. 1995) ("It is the law in this circuit . . . that a municipality may not be held liable on a failure to train theory unless an underlying

> Constitutional violation is located."). After all, a municipality can act only through its officials and employees. However, situations may arise where the combined actions of multiple officials or employees may give rise to a constitutional violation, supporting municipal liability, but where no one individual's actions are sufficient to establish personal liability for the violation. *See Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985); *see also De Feliciano v. De Jesus*, 873 F.2d 447, 450 (1st Cir. 1989) (recognizing that a jury's verdict exonerating individual defendants for unconstitutional termination of a plaintiff's employment may be reconcilable with a verdict holding the municipal entity liable for the violation), *cert. denied*, 493 U.S. 850, 110 S. Ct. 148, 107 L. Ed. 2d 107 (1989).

Id. at 984-86.

As the Court discussed in its analysis of the Iowa Tort Claims Act applicability to the present action, with regard to the concealment of exculpatory evidence, Defendants are not only absolutely immune, but can be said to have been acting as "employees of the state" because such actions were clearly within the scope of their duties as prosecutors *for the State*. Thus, the Court cannot harmonize the lack of liability of Richter and Hrvol with a decision that the County could be liable for such acts. On the other hand, the Court found that a jury could reasonably conclude that the Defendants were not acting within the scope of their duties as a representative of the state in undertaking to arrest Plaintiffs without probable cause and in fabricating/coercing evidence,

thus taking them outside the scope of an "employee of the state" under the Iowa law. Since the County merely argues that Richter and Hrvol were acting as State employees rather than County employees, and does not address whether it could be liable in the face of a finding that they were not acting as State employees, the County has failed to meet its burden to demonstrate that summary judgment is proper.

To the extent that the County argues that Plaintiffs' claims of failure to train and supervise are akin to negligent supervision or retention, the Court also must disagree. Such a cause of action has been repeatedly recognized as viable under *Monell* in this circuit. *See, e.g., Reasonover*, 447 F.3d at 584 ("To establish [a claim of failure to train or supervise under *Monell*, a plaintiff] must show [that the County's] failure to train or supervise 'amounts to deliberate indifference to the rights of persons with whom the [prosecutors] come into contact' and the failure is the 'moving force behind the constitutional violation.'"). The County has offered no evidence which would contradict Plaintiffs' allegations in this regard. Thus, whether Plaintiffs will be able to present sufficient evidence to sustain this claim is a matter necessarily left for trial.

The County next argues that Plaintiffs' § 1983 claims against it, to the extent they state a claim under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), are barred. "Congress intended to hold municipalities responsible under § 1983 only for the execution of official policies and customs, and not for injuries inflicted solely by employees or agents." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125, n.2 (citing *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978) and *Pembaur*, 475 U.S. at

478-480). Defendants assert that only those municipal officers who have "final policy making authority" can subject a local government to § 1983 liability. Defs.' Br. in Support of Mot. for Summ. J. at 34 (citing *Pembaur*, 475 U.S. at 478-80). "Whether an official had final policymaking authority is a question of state law." *Pembaur*, 475 U.S. at 483. According to Defendants, that final policy making authority for Pottawattamie County, under state law, is the Board of Supervisors. Defs.' Brief in Support of Motion for Summ. J. at 35 (citing Iowa Code § 331.301(2) (the "power of a county is vested in the [Board of Supervisors] and a duty of a county shall be performed by or under the direction of the board except as otherwise provided by law")). Thus, Defendants argue that because Plaintiffs have alleged final decision making authority by the Prosecutors only, and have not alleged any action by the Pottawattamie County Board of Supervisors, they have failed to state a cause of action against the County under § 1983.

Plaintiffs urge that they have sued the County under § 1983 because the County Attorney (first Richter, and later Wilber) was the final policymaker for the County with respect to law enforcement matters. Indeed, Richter testified at deposition that the County Attorney was the chief law enforcement officer for the County. The Supreme Court has recognized that "state law will [not] always speak with perfect clarity" on the issue. *Praprotnik*, 485 U.S. at 125. Indeed, the Court recognized that "there will be cases in which policymaking responsibility is shared among more than one official or body." *Id.* at 126. Since Defendants have offered no evidence that the Pottawattamie County Board of Supervisors is the *only* policy making entity for the County, or that the County Attorney lacks policymaking authority with

respect to law enforcement decision in that County, the Court simply cannot conclude as a matter of law that Plaintiffs' § 1983 claim is barred as Defendants assert.[26]

F. McGhee's Freestanding Indemnity Claims

In Count 17 of McGhee's Complaint, he asserts an indemnity claim against the City of Council Bluffs, alleging that the City is obligated to indemnify Larsen and Brown on all claims against them except for punitive damages, pursuant to Iowa Code § 670.8. McGhee asserts an identical claim against Pottawattamie County with regard to its obligation to indemnify Hrvol and Richter against all claims other than punitive damages. Defendants urge that Iowa Code § 670.8 does not provide an independent theory of recovery. The Court believes this complaint by Defendants is one of form rather than of substance.

Iowa Code § 670.8 provides that a governing body "shall save harmless and indemnify the officers and employees against any tort claim or demand . . . arising out of an alleged act or omission occurring

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[26] With respect to Plaintiff McGhee's § 1983 "policy or custom" claim against Pottawattamie County as it relates to Defendants Wilber and Dawson (Count 29), the Court finds that judgment in favor of the County is proper. First, the Court cannot harmonize the lack of liability of Wilber and Dawson with a decision that the County could be liable on the asserted § 1983 claim. Second, the Court has concluded that Plaintiff McGhee has not stated a cognizable constitutional violation stemming from Wilber and Dawson's conduct. *See Schulz*, 44 F.3d at 650 ("It is the law in this circuit . . . that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located.").

within the scope of their employment or duties." Iowa Code § 670.8. The obligation to indemnify also applies to actions under § 1983, but does not extend to "punitive damages" or to "willful and wanton act[s] or omission[s]." *Id.* The duty to indemnify is a mandate under Iowa law, not subject to reasonable dispute. Thus, if a jury finds that any of the 1977 Defendants are liable for non-willful and wanton acts or omissions occurring within the scope of their employment or duties, § 670.8 will require indemnity by the respective municipality. This Court does not provide Complaints to the jury during civil trials. Thus, to the extent that McGhee made any error in pleading indemnity under a separate count, rather than as part of the allegations against individual defendants, the error is harmless.

IV. CONCLUSION

For the reasons stated herein, McGhee's Motion for Leave to File Surreply Brief on County and Prosecutors' Motion for Summary Judgment (Clerk's No. 133) is GRANTED. The Motions for Summary Judgment (McGhee Clerk's No. 95; Harrington Clerk's No. 93) filed by Pottawattamie County, Hrvol, Richter, and Wilber are GRANTED IN PART and DENIED IN PART. Larsen, Brown, and the City of Council Bluffs Motion for Partial Judgment on the Pleadings (Clerk's No. 90) is GRANTED IN PART and DENIED IN PART. Dawson and the City of Council Bluffs Motion for Judgment on the Pleadings (Clerk's No. 99) is GRANTED. Larsen, Brown, and the City of Council Bluffs' Motion for Judgment as a Matter of Law (Clerk's No. 100) is GRANTED IN PART and DENIED IN PART.

With respect to the specific claims alleged, the Court finds the following:

* As to Harrington's Count 1, a § 1983 claim for fabricated and perjured testimony against Defendants Hrvol, Richter, Brown, and Larsen, the pending motions are granted to the extent that the fabricated or perjured testimony was actually used at trial or in judicial proceedings. However, to the extent that the prosecutors fabricated and coerced evidence prior to the filing of the True Information, the pending motions are denied. The prosecutors are not entitled to absolute immunity, and neither the prosecutors nor the police defendants are entitled to qualified immunity on such claims.

* As to Harrington's Count 2, a § 1983 claim for withheld *Brady* and *Giglio* evidence, the pending motions are granted. The prosecutors are entitled to absolute immunity and the police defendants are entitled to qualified immunity.

* As to Harrington's § 1985 conspiracy claim, the pending motions are granted to the extent that the alleged conspiracy arises from the withholding of exculpatory evidence, but denied to the extent the conspiracy is based on a lack of probable cause to arrest and on the fabrication/coercion of evidence.

* As to Harrington's state claims in Counts 4 (intentional infliction of emotional distress), 5 (malicious prosecution), and 6 (loss of parental consortium), the pending motions are granted with respect to the prosecutor Defendants to the extent the claims arise out of the withholding of exculpatory evidence. The pending motions are denied to the extent the claims arise out of claims for arrest without probable cause and fab-

rication/coercion of evidence. The pending motions by the police Defendants are denied.

* As to McGhee's § 1983 claims against Larsen, Brown, Hrvol, and Richter (Counts 1, 5, 9, and 12), the pending motions are granted to the extent that the § 1983 cause of action is based on the concealment of exculpatory evidence, as the prosecutors are entitled to absolute immunity and the police Defendants are entitled to qualified immunity. To the extent the § 1983 claims arise from arrest without probable cause or fabrication of evidence, the pending motions are denied. The pending motions are granted to the extent that the fabricated or perjured testimony was actually used at trial or in judicial proceedings.

* As to McGhee's state law claims against Brown, Larsen, Hrvol and Richter, for Malicious Prosecution (Counts 2 and 6), False Arrest and Imprisonment (Counts 3, 7, 10, and 13), Intentional Infliction of Emotional Distress (Counts 4, 8, 11, and 14), the pending motions are granted with respect to the prosecutor Defendants to the extent the claims arise out of the withholding of exculpatory evidence. The pending motions are denied to the extent the claims arise out of claims for arrest without probable cause and fabrication/coercion of evidence. The pending motions by the police Defendants are denied.

* As to McGhee's§ 1985 conspiracy claim (Count 15) against Brown, Larsen, Hrvol, and Richter, the pending motions are granted to the extent that the alleged conspiracy arises from the withholding of exculpatory evidence, but denied to the extent the conspiracy is based on a lack of

probable cause to arrest and on the fabrication/coercion of evidence.

* As to both Harrington and McGhee's § 1983 claims against Pottawattamie County and the City of Council Bluffs as it relates to the 1977 defendants (Harrington's Counts 1, 2, and 3; McGhee's Count 16 and 18), the pending motions are granted to the extent that the claims arise from the withholding of exculpatory evidence, but are denied in all other respects.

* As to McGhee's Indemnity claims against Pottawattamie County and the City of Council Bluffs (Counts 17 and 19) (for their duties to indemnify the 1977 defendants), the pending motions are denied.

* As to McGhee's Counts 20 (§ 1983), 21 (False arrest and imprisonment) and 22 (intentional infliction of emotional distress) as against Wilber, the pending motions are granted, as Wilber is entitled to absolute immunity.

* As to McGhee's Count 23 (defamation) as against Wilber, the pending motions are denied.

* As to McGhee's Counts 24 (§ 1983); 25 (malicious prosecution); 26 (false arrest and imprisonment); and 27 (intentional infliction of emotional distress) as against Dawson, the pending motions are granted, as Dawson is immune from liability.

* As to McGhee's claim of § 1985 conspiracy as against Wilber and Dawson (Count 28), the pending motions are granted, as the defendants are immune.

* As to McGhee's § 1983 policy or custom claim against Pottawattamie County (Count 29), the

pending motions are granted as McGhee has failed to identify a cognizable underlying constitutional injury.

* As to Mcghee's Indemnity claim (Count 30) against Pottawattamie County as it regards Dawson, the pending motions are granted, as the Court has found Dawson immune from McGhee's claims.

The Court finally notes that, as it prepared to file this Memorandum Opinion and Order, the United States Supreme Court, on February 21, 2007, decided the case of *Wallace v. Kato*, No. 05-1240, 2007 WL 517122. The Court has not had adequate time to conduct a full analysis of the impact of *Wallace* on the remainder of the present case, if any. In any event, the Court believes that parties should be permitted to comment on *Wallace's* applicability or non-applicability to the present case. Accordingly, should the parties have any statement on the matter, they shall submit briefs to the Court no later than March 2, 2007.

IT IS SO ORDERED

Dated this 23rd day of February, 2007.

/s/
ROBERT W. PRATT, Chief Judge
U.S. DISTRICT COURT

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(2)

No. 08-1065

Supreme Court, U.S.
FILED
MAR 17 2009
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IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL,
DAVID RICHTER,

Petitioners,

v.

TERRY J. HARRINGTON,
CURTIS W. McGHEE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TERRY J. HARRINGTON

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QUESTION PRESENTED

Whether this Court's prosecutorial immunity precedent may be expanded to retrospectively extend absolute immunity to prosecutors' investigative functions that deprived Harrington's fundamental liberty interests because the same prosecutors who conspired with police, investigated the crime, fabricated evidence, coerced testimony, and disregarded evidence implicating a Caucasian suspect all *before* they had probable cause to arrest Harrington were also the same prosecutors who prosecuted the crime and procured the conviction against the African-American teenager.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Petitioners through their patently unconstitutional and racially motivated conduct framed, arrested, prosecuted, and convicted Mr. Terry Harrington for a murder he did not commit. He suffered imprisonment for almost 26 years: from November 16, 1977 until April 17, 2003. Harrington spent from age 17 until age 43 in prison. The 18-year-old Terry Harrington testified at his own sentencing hearing after the 1978 trial:

> I just want you to know that no matter what happens, I know I'm innocent, and as long as, you know, I feel that inside, then I'm going to keep on fighting because I know I can't see myself locked up for the rest of my life for something I didn't do . . . . I feel I was judged by the color of my skin and not the content of my character, and I'll always feel that way until I get, you know, the kind of verdict the testimony shows, and that's innocent or not guilty as they would say in the courtroom.

Compl. ¶ 361. He simply had no idea just how many years that fight would last and in how many courtrooms it would proceed. The now 49-year-old Terry Harrington continues his struggle to remedy the rape of his constitutional rights through his present civil rights case.

During his years in prison, sentenced to life at hard labor without the possibility of parole, Harrington lost the society of his family, including his daughter, and friends. He lost his chance to marry and have more

children. He lost his chance to get an education and have a rewarding job. He lost the joys of a free life.

Terry Harrington still suffers today from the effects of petitioners' misconduct. He was thrown back into the world without money or the education or prospects that were open to him in 1977-78 or the intervening years of his incarceration. He continues to suffer the stigma, lost reputation, and diminished employment opportunity that comes with being a "convicted murderer," a scar he would not bear but for petitioners' unconstitutional misconduct.

Petitioners misstate the Eighth Circuit Court of Appeals holding in the panel rehearing opinion as: "a prosecutor is not immune for procurement of false evidence 'where the prosecutor was accused of *both* fabricating evidence *and then using the fabricated evidence at trial.*'" Pet. at 5 (emphasis in original). However, the following represents the actual holding:

> We find immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence *before* filing formal charges, because this is not "a distinctly prosecutorial function." The district court was correct in denying qualified immunity to Hrvol and Ricther for their acts *before* the filing of formal charges.

Pet. App. A at 19a [*McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922, 933 (8th Cir. 2008)] (emphasis added).

The Eighth Circuit explicitly "affirm[ed] the district court in all other respects[,]" *id.*, which held:

> With respect to the specific claims alleged, the Court finds the following:
>
> * As to Harrington's Count 1, a § 1983 claim for fabricated and perjured testimony against Defendants Hrvol, Richter, Brown, and Larsen, the pending motions are granted to the extent that the fabricated or perjured testimony was actually used at trial or in judicial proceedings. However, to the extent that the prosecutors fabricated and coerced evidence *prior to* the filing of the True Information, the pending motions are denied. The prosecutors are not entitled to absolute immunity, and neither the prosecutors nor the police defendants are entitled to qualified immunity on such claims.
>
> * As to Harrington's Count 2, a § 1983 claim for withheld *Brady* and *Giglio* evidence, the pending motions are granted. The prosecutors are entitled to absolute immunity and the police defendants are entitled to qualified immunity.
>
> * As to Harrington's § 1985 conspiracy claim, the pending motions are granted to the extent that the alleged conspiracy arises from the withholding of exculpatory evidence, but *denied to the extent the conspiracy is based on a lack of probable cause to arrest and on the fabrication/coercion of evidence.*

> * As to Harrington's state claims in Counts 4 (intentional infliction of emotional distress), 5 (malicious prosecution), and 6 (loss of parental consortium), the pending motions are granted with respect to the prosecutor Defendants to the extent the claims arise out of the withholding of exculpatory evidence. The pending motions are *denied to the extent the claims arise out of claims for arrest without probable cause and fabrication/coercion of evidence*. The pending motions by the police Defendants are denied.

Pet. App. B at 152a-153a [*McGhee v. Pottawattamie County, Iowa*, 475 F.Supp.2d 862, 927 (S.D. Iowa 2007)] (emphasis added). Petitioners miss the mark by baptizing their investigatory functions as prosecutorial functions ultimately used at trial and thereby converting them into advocatory functions deserving absolute immunity — this is not correct. Prosecutors would thus earn the protection of the Court for their wicked conduct if only they will use it in a judicial proceeding against a defendant. The district court and the circuit court granted the prosecutors absolute immunity for their post-True Information actions for § 1983 and § 1985 purposes as well as state claim purposes. Both courts granted the prosecutors absolute immunity in total for the *Brady* and *Giglio* counts. However, neither the district court nor the circuit court found any immunity for the prosecutors' investigatory functions for their pre-True Information actions under the facts and admissions in this case for § 1983 and § 1985 purposes and state claim purposes.

PROCEDURAL BACKGROUND

After untenable, unrelenting, always at the last moment, delay-inducing procedural efforts by defendants/appellants/petitioners in order to avoid trial in this three-decades-plus-old matter, this case prematurely comes before this Court under the collateral order authority[1] after summary judgment proceedings on immunity issues appealed[2] by only the prosecutor defendants David Richter and Joseph Hrvol. Pottawattamie County itself cannot raise any immunity affirmative defense, and the case will proceed against the county. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) ("These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit — either absolute or qualified under § 1983."). The police/city defendants did not pursue an interlocutory appeal on immunity issues. The current county attorney, Matthew D. Wilber also did not seek an interlocutory appeal on immunity issues relating to Harrington's separate causes of action against him.[3]

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1. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-27 (1985).

2. The panel rehearing decision, *McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922 (8th Cir. 2008), reversed in part, and affirmed in part, the district court's decision, *McGhee v. Pottawattamie County, Iowa*, 475 F.Supp.2d 862 (S.D. Iowa 2007).

3. *See* S.D. Iowa Docket No. 4:03-cv-90616-RP-TJS; *Harrington v. Wilber*, 353 F.Supp.2d 1033 (S.D. Iowa 2005) (denying prosecutor summary judgment); *see also* Pet. App. A at 9a.

Petitioners seek review on certiorari of a decision on a limited interlocutory appeal of the partial summary judgment denial of absolute immunity on violations of Harrington's First, Fourth, Fifth, Sixth, and Fourteenth Amendment rights actionable under 42 U.S.C. §§ 1983 and 1985 (2006). This case does not merit this Court's review at this interlocutory stage under the summary judgment standard of review — particularly because petitioners admitted Harrington's stated facts and waived their probable cause arguments, and thus cannot support their expanded immunity arguments. *See* Pet. App. A at 10a-12a; Pet. App. B at 24a, n.1. Petitioners admitted they functioned as investigators when they procured false testimony. *See* Pet. at 19. Furthermore, the district court and the court of appeals rendered opinions that faithfully applied this Court's precedent.

Harrington steadfastly maintained his innocence and unrelentingly fought to challenge his unconstitutional conviction and denial of liberty and regain his freedom:

- After his conviction for first-degree murder, he directly appealed the conviction, but the Iowa Supreme Court affirmed it on October 17, 1979.

- He filed an application for post-conviction relief that the Iowa District Court ultimately denied on July 13, 1988

- The Iowa Court of Appeals affirmed the denial on January 25, 1990.

- He petitioned for a writ of habeas corpus, which the United States District Court for the District of Iowa denied on November 25, 1991.

- The Eighth Circuit Court of Appeals affirmed the denial on January 8, 1993 in *Harrington v. Nix*, 983 F.2d 872 (8th Cir. 1993).

- He filed a pro se Application for Post Conviction Relief on July 24, 1997, and filed an Amended and Substituted Post Conviction Petition on March 3, 2000, which the Iowa District Court denied on March 5, 2001.

- He appealed this denial, and the Iowa Supreme Court finally reversed his conviction and remanded his case for new trial based on *Brady v. Maryland*, 373 U.S. 83 (1963) due process violations based on newly-discovered, but previously withheld evidence relating to an alternate suspect, in *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003), which ordered his conviction vacated and remanded the case to the Iowa District Court for new trial.

- The State of Iowa timely filed a Petition for Rehearing, which by court rule caused the Iowa Supreme Court not to issue its Writ of Mittimus.

- The Governor of Iowa, the Honorable Thomas Vilsack, on April 17, 2003, granted Harrington a reprieve until such time as the Iowa Supreme Court ruled on the petition for rehearing.

- The Iowa Supreme Court, on April 18, 2003, ruled on the petition for rehearing and thereafter issued its Writ of Mittimus to the Iowa District Court to vacate Harrington's wrongful conviction and to grant him a new trial.

- Because the Governor's Reprieve expired on the Iowa Supreme Court's issuance of its Writ of Mittimus, on April 30, 2003, Harrington voluntarily surrendered himself to the Pottawattamie County Sheriff.

- The Iowa District Court for Pottawattamie County on April 30, 2003 ordered Harrington's 1978 conviction and Sentencing Order vacated and released him from custody on bond and supervision.

- On October 24, 2003, without prejudice to its later re-filing the charge, the State of Iowa dismissed the murder charge against Harrington.

- On March 25, 2005, Harrington filed his present civil rights case under 42 U.S.C. §§ 1983 and 1985 to seek justice.[4]

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4. Harrington filed his civil rights claims and supplemental state claims action in the United States District Court for the Southern District of Iowa on March 25, 2005, Docket No. 4:05-cv-00178-RP-TJS. As was the underlying 1978 murder trial, Harrington's current case is also separate from Curtis W. McGhee Jr.'s case, Docket No. 05-cv-90616, but was consolidated for discovery and trial, currently set for August 3, 2009, under Docket No. 03-cv-90616.

FACTUAL BACKGROUND

The district court opinion detailed the facts of this case, see Pet. App. B at 24a-47a [475 F.Supp.2d at 865-878], and Harrington's complaint thoroughly sets forth the egregious facts underlying his claims. Petitioners have conceded Plaintiff's version of the facts as set forth in the pleadings and in Plaintiff's summary judgment opposition, as recognized by the district court: "The Defendants, with very few exceptions, do not resist the facts as set forth in the Plaintiffs' Complaints for purposes of the pending motions." Pet. App. B at 24a n.1 [*McGhee*, 475 F.Supp.2d at 867 n.1]; *see also Harrington v. State*, 659 N.W.2d at 522. Richter and Hrvol admitted that they were working alongside police: "Petitioners do not dispute that the county attorneys were functioning as investigators at the time they allegedly procured false testimony against respondents; accordingly only qualified immunity applied." Pet. at 19. However, Richter and Hrvol did much more than merely procure false testimony, they personally conspired with the police in creating the manufactured, coerced, and fabricated evidence against Harrington and framing him for a murder he did not commit. In exercising their investigatory functions, they functioned as police officers who could only receive qualified immunity at best.

The prosecutors' actions not "intimately associated with the judicial phase of the criminal process" (actions before or after their prosecutorial or advocatory functions) do not merit immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). This same functional approach applied to Wilber's press conference in the district court's decision in the

Harrington defamation case. *See Harrington v. Wilber*, 353 F.Supp.2d at 1046-47. The Eighth Circuit opinion noted that courts fundamentally agree that "[i]mmunity is absolute only when the prosecutor performs distinctively prosecutorial functions." Pet. App. A at 19a [*McGhee*, 547 F.3d at 933] (citation omitted). As they must, petitioners themselves agree with this proposition: "It is well established that a prosecutor does not have absolute immunity during the *investigative* phase of a criminal proceeding, and that absolute immunity during the *judicial* phase does not 'retrospectively' immunize earlier wrongful acts." Pet. at 18 (emphasis in original).

Petitioners' reasoning cannot extend as far as they allege without gutting this Court's prosecutorial immunity functional approach precedent and granting all prosecutorial investigatory functions absolute, rather than qualified, immunity.

REASONS FOR DENYING THE PETITION

I. No Circuit Split Exists

The petitioners' request that this Court step in at this early stage in the proceedings is fundamentally misguided. Petitioners' assertion that there is a conflict among the circuits is incorrect, and in the absence of a conflict the issue is merely one of application of this Court's prosecutorial immunity precedent to a unique set of facts. Review of the fact-bound determination is unwarranted.

Petitioners did not argue the false circuit split in their petitions for rehearings (panel or en banc). Those petitions focused on Eleventh Amendment and state tort claims act issues, without the emphasis placed on the constitutional issues presented here. Petitioners did not question Harrington's right to go to trial on his civil rights claims in footnote 2 of those petitions for rehearing. Petitioners recognized that, even if their petition succeeded on the state law claims, they would still face the federal civil rights claims: They admitted in a footnote that winning their sovereign immunity argument would leave the federal civil rights claims intact. *See* Pet. For Reh'g at n.2. On November 21, 2008, the panel decided the petition for rehearing. Petitioners serially raise alternative theories in a relentless effort to avoid trial.

Under this Court's Rule 10, the Eighth Circuit's application of the "properly stated rule of law" of *Buckley* to the particular allegations of Harrington's complaint is not a question worthy of a grant of certiorari. Petitioners' contrary claim that this fact-bound and interlocutory ruling merits review by this Court rests principally on the contentions that it conflicts with the holdings of the Third and Seventh Circuits. Review of the decisions petitioners cite, however, reveals that the "conflict" is illusory.

Petitioners argue that they are entitled to absolute prosecutorial immunity under *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1985) ("*Buckley II*"). Petitioners claim that there is a conflict among the circuits, and that this Court is likely to take this case to resolve that conflict. This claim is

false, particularly after review of the underlying facts in the cases petitioners cite.

On remand from this Court, *Buckley II* applied a qualified immunity analysis and did not need to apply the absolute immunity analysis from this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Importantly, *Buckley II* involved facts fundamentally different from those present here — the Seventh Circuit analyzed a situation in which the prosecutors who conspired to manufacture false evidence that would link boot print evidence to Buckley and who coerced and paid for witness testimony against Buckley under their investigatory functions were not all the same prosecutors who presented the evidence under their advocatory functions before the grand jury or at trial. *See Buckley II*, 20 F.3d at 800. *Buckley II* focused on causation. The Eighth Circuit here analyzed the situation where the prosecutors did not change, and thus, no causal break merits the same *Buckley II* qualified immunity distinction. In conformance with the functional approach announced in *Imbler*, 424 U.S. at 431, this Court held in *Buckley* that prosecutors have the same qualified immunity as police when they function like police, i.e., as investigators.

Police have no immunity when they lack probable cause to believe the plaintiff is guilty of a crime and fabricate evidence to frame the plaintiff, and neither do prosecutors. *Buckley*, 509 U.S. at 273. Police are liable for all of the natural consequences of their unconstitutional conduct during a criminal investigation, and so are prosecutors. *Id.* In *Monroe v. Pape*, 365 U.S. 167, 171 (1961), this Court held that § 1983 "should be

read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. If the same prosecutors who violated the person's constitutional rights when they functioned as investigators initiate a prosecution, then those same prosecutors cannot launder their previous investigative functions by retroactively invoking their later-adopted prosecutorial functions.

The functional approach rationally interprets prosecutorial immunity. In *Clinton v. Jones*, 520 U.S. 681, 693 (1997), the Court stated: "In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." Prosecutors do not have to function as investigators; and "there is no common-law tradition of immunity for [fabrication of evidence], whether performed by a police officer or prosecutor." *Buckley*, 509 U.S. at 274.

Absolute immunity does not apply to prosecutors' actions taken outside their advocatory functions. *Imbler*, 424 U.S. at 424. Except as to personnel budget, or investigation, prosecutors' duties embrace advocacy. While absolute immunity attaches to a prosecutor's advocatory conduct, the fact remains that *Imbler's* immunity rule does not reach all duties of a prosecutor. While *Imbler* refused to delineate the boundaries of a prosecutor's duties beyond which absolute immunity would not extend, this Court emphasized that immunity was not limited to the prosecution function performed inside the courthouse door: "We recognize that the

duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Imbler*, 424 U.S. at 431 n.33. The Court very recently approved the *Imbler* function test and embraced the fact that prosecutors do not receive absolute immunity in section 1983 actions that do not involve "acting as an 'officer of the court,' but is instead engaged in other tasks." *Van de Kamp v. Goldstein*, 555 U.S. ___, 129 S. Ct. 855, (2009).[5] This Court reviewed its holdings since *Imbler*, namely:

> that absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation, see *Burns*, *supra*, at 496, when the prosecutor makes statements to the press, *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993), or when a prosecutor acts as a complaining witness in support of a warrant application, *Kalina*, *supra*, at 132 (Scalia, J., concurring).

Id. at 861. This reasoning voids petitioners' arguments for wholesale absolute immunity.

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5. The first case to cite this decision granted absolute immunity to the special prosecutor based on distinguishable facts that focused on the prosecutor's advocatory functions (not at issue in the present case), but recognized that if the prosecutor has "acted as an investigator, he would not be cloaked with absolute immunity, but he may be entitled to qualified immunity." *See Aretakis v. Durivage*, No. 1:07-CV-1273, 2009 WL 249781, at *17 (N.D.N.Y. Feb 03, 2009) (also discussing Second Circuit prosecutorial immunity functional approach cases at *15).

Other decisions made by this Court have also reaffirmed *Imbler's* functional approach, sustaining absolute immunity for a prosecutor when performing an advocatory function, but disallowing it when the conduct is divorced from, or only tangentially linked, to that function. *See Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985) (noting Attorney General denied absolute immunity for allegedly authorizing illegal wiretapping in furtherance of national security); *Burns v. Reed*, 500 U.S. 478, 493 (1991) (concluding absolute immunity applied to a prosecutor's conduct of a probable cause hearing but not when giving legal advice to the police prior to arrest during the investigative phase of the criminal case); *Buckley*, 509 U.S. at 274-76 (1993) (holding absolute immunity denied to prosecutor who allegedly fabricated evidence during investigation well before grand jury and arrest, and made statements in a press conference after indictment); *Kalina v. Fletcher*, 522 U.S. 118 (1997) (denying absolute immunity to prosecutor who acted as witness, not advocate, by certifying affidavit in support of search warrant).

Other courts also apply similar reasoning based on this Court's controlling precedent. The Ninth Circuit Court of Appeals explained: "Although we focus on the administrative nature of Gammick's and Helzer's conduct, by attempting to dictate the manner in which future investigations should be staffed and conducted, the prosecutors were likely engaging in an investigative rather than a judicial function." *Botello v. Gammick*, 413 F.3d 971, 977 n.5 (9th Cir. 2005) (citing *Buckley*, 509 U.S. at 273 ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor

justifiable that, for the same act, immunity should protect the one and not the other") (internal quotation marks omitted)); *see also Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001) (denying absolute immunity to a prosecutor who fabricated evidence before charges were filed). The Third Circuit also looked at scope of prosecutors' duties in determining immunity. *See Carter v. City of Philadelphia*, 181 F.3d 339, 356-357 (3d Cir.), *cert. denied*, 528 U.S. 1005 (1999) (concluding no absolute immunity for district attorney supervisor's failure to set police and district attorney policy and training to discourage police perjury and procurement of false eyewitness testimony and to discipline offenders). The D.C. Circuit found that intimidating and coercing witnesses into changing their testimony is not an advocatory function, but rather a "misuse of investigative techniques" that relate to typical police functions. *Moore v. Valder*, 65 F.3d 189, 195 (D.C. Cir. 1995). Thus, when prosecutors assume the role of and function as law enforcement they act outside any judicial or quasi-judicial prosecutorial function and absolute immunity cannot apply.

In the present case, Harrington's § 1983 and § 1985 claims arise from the petitioners' admittedly investigatory functions before they were exercising advocatory functions. The unique and admitted facts in this case distinguish it from many other prosecutorial immunity cases and merit the distinct analysis provided by the district and circuit courts.

After exhaustive factual and legal review, the opinions already issued regarding the immunity issues presented in this case have resolved the immunity

questions in accordance with this Court's precedent and the great weight of other circuit court precedent, albeit not to the petitioners' liking.

This Court has specifically held the fact that prosecutors' use of the fabricated evidence later in immunized proceedings does not relieve them of liability for their misconduct during the investigation:

> A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.

Buckley, 509 U.S. at 276. Prosecutors may not be liable for the act of using the false evidence in court, but they remain liable for the fabrication of that evidence during the investigation — just like the police. *Id.* at 276. This Court also warned against petitioners' attempted construct: "Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Burns*, 500 U.S. at 495. Petitioners explicitly recognize this fact: "It is well established that a

prosecutor does not have immunity during the *investigative* phase of a criminal proceeding, and that absolute immunity during the *judicial* phase does not 'retrospectively' immunize earlier wrongful acts." (Pet. at 18, emphasis in original). Petitioners, however, contort this precedent by making the incorrect argument that the fabricated evidence used at trial immunizes prosecutor misconduct during the investigation. *Id.* at 15. Regardless, the function test does not provide for the wholesale absolute immunity petitioners desire. To reach this result, this Court would have to abandon decades of precedent contrary to stare decisis principles. If a claim is "well embedded in the law" this Court has stated: "considerations of stare decisis strongly support our adherence to that view. And those considerations impose a considerable burden upon those who would seek a different interpretation that would necessarily unsettle many Court precedents." *CBOCS West, Inc. v. Humphries*, __ U.S. __, __, 128 S. Ct. 1951, 1958 (2008).

The Eighth Circuit's decision accords with this Court's decision in *Buckley*. Indeed, the circuit court properly applied this precedent: "Before the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity." Pet. App. A at 11a [*McGhee*, 547 F.3d at 929] (citing *Buckley*, 509 U.S. at 274, "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."). This precedent undermines petitioners' absolute immunity arguments. Petitioners *admitted* for the purposes of this appeal that Hrvol and Richter lacked probable cause to believe that Harrington was guilty of the Schweer

murder.[6] Petitioners also *admitted* that Hrvol and Richter were working hand-in-hand with police to fabricate evidence to frame innocent African-American teenagers for that murder, and it cannot be denied that Harrington served an unconscionable prison term as a result. These facts clearly state a § 1983 claim and a § 1985 claim against the prosecutors for which they have no immunity for their investigatory functions.

Petitioners' reliance on *Buckley II* simply fails to support their arguments. In *Buckley II*, after this Court's remand, two judges of the Seventh Circuit under a qualified immunity analysis, as directed by this Court, held that Buckley failed to state a claim against the prosecutors for the alleged payment for and coercion of witness testimony that inculpated the plaintiff in a murder case. 20 F.3d at 796. They reasoned that Buckley was not injured by the false statements. *Id.* Indeed, this Court expressly rejected what petitioners argue *Buckley II* stands for in the *Buckley* decision. 509 U.S. at 274. The *Buckley II* court likewise realized that "[i]mmunity for prosecutorial deeds does not whitewash wrongs completed during the investigation." 20 F.3d at 796. *Buckley II* plainly does not stand for the proposition petitioners forward. The harm in the case at bar differs from the lack of harm in the *Buckley II* case because the petitioners' affirmative investigatory acts went beyond coercing and paying for witness testimony and violated Harrington's rights without any causal break.

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6. Petitioners waived any argument to the contrary. *See* Pet. App. A at 11a-12a [*McGhee*, 547 F.3d at 929].

The district court and the circuit court recognized a violation of Harrington's substantive due process rights before the petitioners engaged in advocatory functions. The distinction in Harrington's case is that the prosecutors who concocted the evidence remained the same before and after trial — unlike some of the prosecutors in *Buckley II*. *See* 20 F.3d at 800. No causal break as to the location of the injury occurred in the present case, thus the prosecutors here cannot whitewash wrongs initiated during the investigation.

The Seventh Circuit's 1994 decision in *Buckley II* and the Third Circuit decision adopting its reasoning, *Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000), *cert. denied sub nom. Michaels v. McGrath*, 531 U.S. 1118 (2001),[7] comply with this Court's precedent — but only as regards immunity for prosecutors' advocatory functions — not at issue in the present appeal. They

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7. Justice Thomas wrote in his dissent to the Court's denial of certiorari:

> In *Zahrey*, the Second Circuit took the position that a plaintiff does state a claim under § 1983 when he shows that prosecutorial misconduct in gathering evidence has led to a deprivation of his liberty. The intervention of a subsequent immunized act by the same officer does not break the chain of causation necessary for liability.
>
> I believe that the Second Circuit's approach is very likely correct, and that the decision below [*Michaels*] leaves victims of egregious prosecutorial misconduct without a remedy. . . .

531 U.S. at 1118.

are based in part on the view that, when a witness is coerced to testify falsely against the plaintiff at trial, only the witness's constitutional rights are violated, not the plaintiff's. *Buckley II*, 20 F.3d at 794-795; *Michaels*, 222 F.3d at 122. *Buckley II* and *Michaels* are further distinguishable from this case in that the defendants in those cases did not admit that they lacked probable cause to believe that the plaintiff was guilty of the crime, and did not admit that they themselves fabricated evidence and coerced testimony before probable cause existed. However, petitioners admitted those facts for the purposes of this appeal. The Second Circuit's opinion, *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000), fits the facts and causation in the present case. *Buckley II* and *Michaels* simply do not represent the circuit split petitioners allege.

The paucity of relevant cases cited by petitioners is ironic given their assertion that the issue presented is a "critical issue" (Pet. at i, 2) on which "the circuits are divided." Pet. at 2. In the more than thirty years since *Imbler* was decided, petitioners can point to only two federal appellate decisions that present even vaguely similar issues. The most recent case they cite is the nearly decade old *Michaels* case. "Unlike decisions of this Court, decisions of the courts of appeals, even when unanimous, do not carry stare decisis weight, nor do they relieve us of our obligation independently to decide the merits of the question presented." *CBOCS West, Inc.*, __ U.S. at __, 128 S. Ct. at 1970 (Thomas, J., dissenting).

In sum, the specific factual difference between *Buckley II* and *Michaels* and the present case cannot support finding a circuit split. Nor is there any reason

to believe that this Court is likely to abandon its functional approach precedent to find that prosecutors who admit they lacked probable cause and fabricated evidence during an investigation are entitled to absolute immunity from § 1983 and § 1985 liability as petitioners wish. The district court opinion thoroughly, and properly, analyzed the precise issue that petitioners raise:

> The Court finds the reasoning of *Zahrey and Thomas* [*Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984)], compelling and adopts the reasoning contained therein in its conclusion that the prosecutors' alleged fabrication/coercion of evidence caused Plaintiffs' deprivation of liberty by denying them due process, despite the fact that the prosecutors' acts of using the fabricated/coerced evidence *at trial* is shielded by absolute immunity. *Wilson*, 260 F.3d at 954 ("If officers use false evidence, including false testimony, to secure a conviction, the defendant's due process is violated."). Plaintiffs have, therefore, asserted a cognizable violation of their own constitutional or statutory rights.

Pet. App. B at 112a [*McGhee*, 475 F.Supp.2d at 908] (emphasis in original). The district court, and the circuit court through its affirmance, properly applied the function test to the distinct and admitted facts presents in this case to divide the prosecutors' actions among the different immunity levels.

Finally, even if the Court were interested in addressing whether and under what circumstances the investigatory functions of a prosecutor merit absolute

immunity, the interlocutory posture of this case would make it a poor choice as a vehicle for deciding such issue. Proceedings on remand could yet obviate the need to address the function test altogether if Harrington does not succeed in proving his case. More importantly, even positing (as we do) that Harrington will be able to prove the allegations of his complaint, a factual record disclosing exactly what the investigative functions or adjudicative functions were in the circumstances of this case would contribute to a more informed decision on the application of the *Buckley* principles in a concrete factual setting. This case is, therefore, an obvious candidate for application of this Court's normal practice of not granting certiorari to review an interlocutory ruling of a federal court of appeals. *See* Stern, Gressman, Shapiro & Gellar, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). Without more development in the court below, the Eighth Circuit's ruling in this case is still too preliminary for review "given the interlocutory posture of this case." *Nike, Inc. v. Kasky*, 539 U.S. 654, 659 (2003).

II. Petitioners' Substantive Due Process Argument Is Meritless

Petitioners argue at length that the Eighth Circuit erred in failing to evaluate Harrington's claims under the proper constitutional standard. Indeed, petitioners go so far as to claim that the both the district court and circuit court dispensed completely with a particularized constitutional right violation analysis. Pet. at 12. According to petitioners, the Eighth Circuit omitted this review and cut out of whole cloth a new substantive due process right, but petitioners' assertion is obviously

incorrect. "'The touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). The Due Process Clause includes a substantive component that "bar[s] certain [arbitrary wrongful] government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

Petitioners argue against the substantive due process rights found in this case and state that in addition to conflicting with Seventh Circuit law, which does not govern this action, finding "such a 'substantive due process' right against procurement of false evidence, far from being 'clearly established,' has no basis in this Court's precedents." Pet. at 8. This Court's decision in *Reno v. Flores*, 507 U.S. 292 (1993) belies petitioners' assertion. Notably, *Reno* analyzed the

> line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of "due process of law" to include a substantive component, which forbids the government to infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

Id. at 301-02 (citing *Collins v. Harker Heights*, 503 U.S. 115, 125, (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986)). Harrington carefully described clearly established constitutional rights, long recognized since at least

Mooney v. Hollohan, 294 U.S. 103 (1935) (finding a prosecutor's knowing use of perjured testimony violates the Fourth Amendment), which petitioners violated as denials of his fundamental liberty interests; he pleaded: freedom of association under the First Amendment; his right to due process, a fair trial and equal protection guaranteed to him by the Fourth, Fifth, Sixth, and Fourteenth Amendments in addition to his rights against unreasonable seizures of his body guaranteed to him by the Fourth Amendment as well as a distinct conspiracy claim. Justice Scalia's concurrence in *Buckley* described that prosecutors' "knowing *use* of fabricated evidence before the grand jury and at trial. . . might state a claim for denial of due process[,]" but concluded that defamation immunity provided complete protection from the § 1983 suit. *Buckley*, 509 U.S. at 281 (Scalia, J. concurring) (citing *Mooney*) (emphasis in original). This recognition carries through to the temporal line drawn by the district court as affirmed by the circuit court wherein prosecutors would not receive complete protection for investigatory functions effectuated before the judicial process. Harrington's rights fall under the protections of the substantive due process clause as recognized by this Court's precedents.

Of course, the plurality *Albright v. Oliver*, 510 U.S. 266 (1994) decision requires more than a generalized notion of substantive due process; the decision explained "the first step in any such claim [§ 1983] is to identify the specific constitutional right allegedly infringed." 510 U.S. at 271. The limited claim pleaded in *Albright* "to be free from prosecution except on the basis of probable cause" did not meet this Court's criteria for a case in which substantive due process rights have been

recognized, *id.* at 272, and substantially differs from the numerous claims at issue here. Further, in *Albright*, no criminal sentence ensued because the indictment was dismissed and the only liberty interest deprivation consisted of the pretrial arrest period. Thus, clearly the Fourth Amendment applied rather than substantive due process. *Id.* at 275. The facts at issue in *Albright* do not compare in kind to the present facts that represent the type of arbitrary authority by the government that the substantive due process clause seeks to restrict. The Eighth Circuit properly found that the pleadings in total set forth a proper substantive due process violation.

In *Monroe v. Pape*, 365 U.S. at 171, this Court held that § 1983's purpose is clear from its title: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Substantive due process perfectly fits this case to further § 1983's broad, remedial purposes.

Thus, the issue before the Eighth Circuit was not that Harrington had alleged a *Brady* violation (a procedural due process violation), because no one could possibly doubt that he had based on the Iowa Supreme Court's finding, but rather whether he had alleged a basis for holding petitioners liable for the other violations of his civil rights. As the Eighth Circuit correctly understood, but petitioners apparently do not, that question turned on whether the challenged functions were investigatory or advocatory. "Certain wrongs affect more than a single right and, accordingly can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). In short, the circuit court held that Harrington

had adequately alleged that the petitioners' "obtaining, manufacturing, coercing and fabricating evidence before filing formal charges" functions were investigatory and that they had resulted, in his case, in a deprivation of his substantive due process rights (a deprivation whose existence is further supported and confirmed by his successful post-conviction review efforts). Pet. App. A at 19a.

The liberty interests denied Harrington by the petitioners illustrate the inherent value in substantive due process clause:

> the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was "intended to secure the individual from the arbitrary exercise of the powers of government [.]" . . . [B]y barring certain government actions regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being "used for purposes of oppression."

Daniels, 474 U.S. at 331 (citations omitted) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884) and *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)). Substantive due process appropriately applies to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 331 (emphasis in original). "The touchstone of due process is protection of the individual against arbitrary action of government." *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).

Petitioners also raise an inapplicable, as applied to the facts and law of this case, statute of limitations issue based on *Wallace v. Kato*, 549 U.S. 384 (2007), a Fourth Amendment accrual decision.[8] Further, petitioners' argument on this issue remains pending before the district court and petitioners did not appeal this issue. Neither the district court nor the court of appeals has ruled on this issue and the petition for certiorari on this ground proves premature.

Petitioners' argument, too, rests on a fundamental misunderstanding of *Wallace* and *Heck v. Humphrey*, 512 U.S. 477 (1994). Under petitioners' assertions, all arrestees would have to raise any potential false arrest claims within the applicable statute of limitations period running from the date of the arrest — even if the arrestee does not yet know or have proof that the arrest is "false." The fact-bound *Wallace* holding would not apply in a situation like Harrington's, as Justice Ginsburg's concurrence in *Albright* presciently elucidated:

> Once it is recognized, however, that Albright remained effectively "seized" for trial so long as the prosecution against him remained pending, and that Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure, then the

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8. This Court recently denied certiorari in *DeReyes v. Wilkins*, 528 F.3d 790 (10th Cir. 2008), *cert. denied*, __ S. Ct. __, 2009 WL 498175 (March 2, 2009), which presented the Fourth Amendment accrual issue against police defendants.

> limitations period should have a different trigger. The time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges against Albright.

510 U.S. at 280. *Heck* governs the present case because Harrington could not bring his civil rights claims stemming from the claims that would render his conviction invalid until after his conviction was overturned. 512 U.S. at 486-87. *Wallace* does not govern the present case because the false arrest in *Wallace* was made without probable cause and without warrant, but then proper process followed to cure the earlier defect. Fabricated evidence, disregarded evidence, and coerced testimony caused Harrington's arrest, conviction, and wrongful incarceration. The present case amply illustrates how an arrestee may be unable to prove the falsity of the arrest. Indeed, the concealed police reports pointing to another suspect were not discovered until 1999, *nearly two decades after* Harrington's November 16, 1977 arrest and May 8, 1978 True Information, and only then by someone voluntarily operating independently of the justice system in Harrington's interest. *Harrington v. State*, 659 N.W.2d at 518. Additionally, the witness recantations of the false testimony fabricated and coerced by petitioners "could not have been discovered earlier in the exercise of due diligence." *Id.* at 517. Were this Court to adopt petitioners' reasoning, a vast increase in fruitless filings to potentially preserve statutes of limitations would unnecessarily impact the court system.

Furthermore, Fourth Amendment false arrest claims are not the sole claims Harrington brings against petitioners as was the *Wallace* situation. To be sure, Harrington pleaded intentional violations of: his right to freedom of association guaranteed to him by the First Amendment, his right to due process, a fair trial and equal protection guaranteed to him by the Fourth, Fifth, Sixth, and Fourteenth Amendments in addition to his rights against unreasonable seizures of his body guaranteed to him by the Fourth Amendment as well as a distinct racially-motivated conspiracy claim. Therefore, these additional reasons instruct why petitioners' false arrest statute of limitation argument neither applies to the present case nor merits this Court's review.

CONCLUSION

Despite petitioners' best efforts to eliminate the functional approach and expand wholesale prosecutorial immunity, no issue worthy of this Court's review can be teased out of this case. The Eighth Circuit's holding that the function test under *Buckley* precludes absolute immunity for the investigatory functions petitioners undertook in this case to deny Harrington his constitutional rights properly applied this Court's precedents and in no way departed from this Court's precedent. No real circuit split exists; and this appeal is in any event interlocutory in nature. Petitioners' substantive due process argument reflects a basic misunderstanding of this Court's teachings, and its statute of limitations arguments show an equally fundamental misunderstanding of civil rights law. The August 3, 2009 trial remains the proper place to address the remaining issues.

For the foregoing reasons, Harrington respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA
JOSEPH HRVOL,
DAVID RICHTER,

Petitioners,

v.

TERRY J. HARRINGTON,
CURTIS W. McGHEE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CURTIS W. McGHEE, JR.

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STATEMENT

Petitioners were a County Attorney and Assistant County Attorney who, along with police, fabricated evidence during a murder investigation to frame two innocent black teenagers, Terry Harrington and Curtis W. McGhee, Jr., for the killing of a retired white Police Captain during an election year for County Attorney. Harrington and McGhee spent over twenty-five years in prison for something they did not do as a result.

In *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("*Buckley I*"), this Court held that prosecutors do not have absolute immunity during the *investigative* phase of a criminal proceeding. Thus, the courts below correctly applied *Buckley I* to deny absolute immunity protection to petitioners. Indeed, petitioners do not claim absolute immunity here. Pet. at 19.

Instead, petitioners claim qualified immunity based on the Seventh Circuit's decision in *Buckley v. Fitzsimmons*, 20 F.3d 789 (1994) ("*Buckley II*"), a case that has been followed only once in the last fifteen years, and that eight years ago.[1] They first argue that coercing and coaching witnesses to testify falsely to frame Harrington and McGhee for murder did not violate their constitutional rights. But this claim will not withstand scrutiny. Lies coerced and coached by police and prosecutors do not support the probable cause required for arrest or the initiation of legal proceedings under the Fourth Amendment. The fabrication of evidence by

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[1] Justice Thomas expressed the view that *Buckley II* was wrongly decided in *Michaels v. McGrath*, *infra*.

these governmental officials to deprive two innocent teens of a fair trial on murder charges – and ultimately deprive them of their liberty for over twenty-five years each - shocks the conscience, and constitutes a violation of Harrington and McGhee's right to substantive due process.

Harrington and McGhee's right to the equal protection of the laws was also violated in that their race was a factor in the misconduct. Pottawattamie County, Iowa was and is over 99% white. Petitioners needed a conviction in the worst way in a high-profile murder case during an election year. They framed Harrington and McGhee rather than investigate their real suspects for the murder – principally a local white man named Charles Richard Gates – at least in part because they knew a white jury in Council Bluffs, Iowa would readily convict two black teens from Omaha for killing a retired white Council Bluffs police officer.

Finally, petitioners argue that holding them liable for all of Harrington and McGhee's detention from their arrest in November 1977 until their release from prison in 2003 would improperly deprive them of the absolute immunity afforded to prosecutors for the knowing use of fabricated evidence at trial. But this Court held in *Buckley I* that the absolute immunity afforded prosecutors during the *judicial* phase of criminal proceedings does not extend "retrospectively" to immunize their misconduct during the *investigative* phase. 509 U.S. at 276. Petitioners concede this fact in their petition. Pet. at 18. Police are liable under Section 1983 for all of the natural consequences of their actions when they fabricate evidence during a criminal

investigation, and so are these prosecutors under *Buckley I*. Indeed, this Court cited this principle with approval a little over one month ago. *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (January 26, 2009).

REASONS FOR DENYING THE PETITION

The decisions below are correct and trial should not be further delayed for this Court to review them. The Seventh Circuit's *Buckley II* decision is an isolated aberration and does not represent a true conflict among the circuits which this Court need address, especially when the delay required to produce the almost certain result – reaffirmation of *Buckley I* – would be so hurtful to plaintiffs who have already waited too long for their day in court. Nor would a ruling in petitioners' favor on the immunity issue avoid a trial. The County would still have to go to trial because County Attorney Richter, its highest law enforcement officer, was personally involved in the unconstitutional misconduct. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The County has no immunity against this claim. *Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit*, 507 U.S. 163 (1993).

Plaintiffs have been waiting for justice for more than thirty years. At long last, the judicial system owes Terry Harrington and Curtis W. McGhee, Jr., a trial with all deliberate speed.

I. Petitioners do not enjoy absolute immunity under *Buckley I*.

A. Petitioners fabricated evidence to frame two innocent black teens for murder.

The facts of this case are set forth at some length in the district court opinion. Pet. Appx. B at pages 24a-47a. Petitioners admit these facts here. Pet. Appx. B at 24a, n. 1 ("The Defendants, with very few exceptions, do not resist the facts set forth in the Plaintiffs' Complaints for purposes of the pending motions.").

In summary, County Attorney David Richter and Assistant County Attorney Joseph Hrvol fabricated testimony in order to frame two innocent teenagers for first degree murder. They did so because it was a "heater" case – the murder of a retired white Council Bluffs Police Captain, John Schweer – and County Attorney Richter – who had been appointed to the office – had his first election coming. Petitioners wanted to get a conviction in the worst way, and that is what they did.

Petitioners admit they never had probable cause to believe Harrington and McGhee were guilty of the murder. They further admit that, along with Council Bluffs police, they used threats, intimidation and offers of reward to get a known liar, Kevin Hughes, to make false statements against them anyway. Petitioners admit they coached Hughes to dress up his story by deleting things from his prior statements that were demonstrably false and adding things to make his lies seem more plausible. They offered Hughes a reward to

sweeten the pot. They intimidated Hughes's friends – Jones, Jacobs, Pride and Lee – into lying that they saw Hughes with Harrington and McGhee on the night of the murder to give the appearance of "corroboration" for part of Hughes's story. After having Harrington and McGhee arrested pursuant to warrant in November 1977, but before the True Informations were filed, petitioners offered leniency to teenage prisoners facing adult charges – Pierce, Plater and Hartwell – if they would state that McGhee had confessed involvement in the Schweer murder to them.[2] All of these witnesses have admitted they told lies they were told to tell by petitioners and police.

Petitioners not only failed to investigate Gates. They also concealed him from the defense. The Iowa Supreme Court vacated Harrington's conviction on account of this *Brady* violation, and the State agreed to vacate McGhee's 1978 conviction for the same reason. The district court held the *Brady* violation was protected by absolute immunity, but the concealment of Gates, a real suspect who had not been eliminated, provides further evidence that petitioners knew they lacked probable cause to believe Harrington and McGhee were guilty.

Racial prejudice against McGhee and Harrington as African-Americans was a motivating force in this

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[2] Pierce and Plater's statements were obtained in February 1978 before the February 17, 1978 True Information against McGhee for the murder. Hartwell's statement was obtained in April 1978 before McGhee's May 1978 trial and the May 8, 1978 True Information against Harrington for the murder.

misconduct. Petitioners wanted a conviction, and they framed Harrington and McGhee because they cared little for blacks – their County was over 99% white – and because they knew a white Council Bluffs jury would readily convict two black teenagers from across the Missouri River in Omaha, Nebraska for the killing of a white Council Bluffs, Iowa police officer. Indeed, they preferred framing two innocent black teenagers to conducting a proper investigation of white suspects like Gates.

Without the fabricated testimony, there was no evidence connecting plaintiffs to the murder. That is an admitted fact for the purposes of this appeal. It is also undisputed that Harrington and McGhee were each imprisoned from their arrest pursuant to warrant in November 1977 until their release in 2003. Each man spent more than twenty-five years in prison for something he did not do.

B. This Court's decision in *Buckley I*.

This Court's decision in *Buckley I* governs the absolute immunity issue presented here. In that case, the Court was asked to decide whether absolute immunity protected prosecutors when, as here, they fabricate evidence during the preliminary investigation of a crime. The Court applied the functional approach it had adopted in earlier cases to draw the line between those acts protected by qualified immunity and those protected by absolute immunity. 509 U.S. at 269. This inquiry focuses on the nature of the function performed rather than the identity of the person who performed it. *Id.*

The Court noted in *Buckley I* that, while a prosecutor's activity as an advocate is protected by absolute immunity, he only enjoys qualified immunity for administrative and investigative work that does not relate to an advocate's preparation for the initiation of a prosecution or judicial proceedings. *Id.* at 273. The Court explained:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Id. [citation omitted].

The Court used probable cause to divide a prosecutor's role as investigator from his role as advocate. It found that the advocate's role does not begin until probable cause exists. As absolute immunity only protects the prosecutor as advocate, the lack of probable cause at the time of the alleged prosecutor misconduct means that there is no absolute immunity for that conduct:

> A careful examination of the allegations concerning the conduct of the prosecutors

> during the period before they convened a special grand jury to investigate the crime provides the answer. The prosecutors do not contend that they had probable cause to arrest petitioner or to initiate judicial proceedings during that period. Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.

Id.[3]

As the prosecutor's acts in *Buckley I* "occurred well before they could properly claim to be acting as advocates," the Court found that absolute immunity did not protect them against the plaintiff's allegations. *Id.* at 275. And the fact that the prosecutors later used the evidence in court did not cloak their involvement in fabricating that evidence during the investigation with absolute immunity:

> A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial; every prosecutor might

[3] In footnote 5, the Court observed that a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. A prosecutor would still only have qualified immunity for administrative/investigative work done after probable cause was determined. 509 U.S. at 274.

> then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.

Id. at 276. See also *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000) (Prosecutor who participated in fabrication of evidence in his investigatory role and then used it in court is not protected by absolute or qualified immunity); *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001) (prosecutor involved in fabricating evidence before charges are filed not protected by absolute immunity); *Moore v. Valder*, 65 F.3d 189, 195 (D.C. Cir. 1995) ("Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of *investigative* techniques . . . [and] therefore relates to a typical police function . . .").

About one month ago, a unanimous Court again noted that absolute immunity does not apply when a prosecutor is engaged in investigative or administrative tasks. *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (Jan. 26, 2009).

C. The Eighth Circuit correctly applied *Buckley I*.

Petitioners do not claim in their petition that they had probable cause to believe Harrington and McGhee were guilty of the murder. They admit that they were acting as investigators when they allegedly fabricated

the evidence, and that absolute immunity does not apply. They state at page 19 of their petition:

> Petitioners do not dispute that the county attorneys were functioning as investigators at the time they allegedly procured false testimony against respondents; accordingly, only qualified immunity applied.

Given this admission, there can be no doubt that the courts below were correct to deny absolute immunity protection to petitioners.

II. Petitioners do not enjoy qualified immunity against plaintiffs' claims.

Petitioners argue that they have qualified immunity against Harrington and McGhee's Section 1983 claims. Their first argument is the strange notion that manufacturing evidence to frame a defendant for murder does not violate the defendant's Constitutional rights. Their second argument is that the only injury they caused to Harrington and McGhee occurred when they presented the false evidence at their criminal trials, conduct for which they enjoy absolute immunity. Petitioners base this argument on the Seventh Circuit's decision in *Buckley II*. But that decision is in conflict with this Court's decision in *Buckley I* and other established Supreme Court precedent.

A. The fabrication of evidence violated plaintiffs' constitutional rights.

In *Buckley II*, two judges of that court began by finding that coercing witnesses to testify against a criminal defendant does not violate the defendant's constitutional rights. But this Court has never so held. A finding that petitioners' manufacture of evidence does not violate Harrington and McGhee's constitutional rights would fly in the face of this Court's decision in *Mooney v. Holohan*, 294 U.S. 103 (1935).

In that case, Mooney was serving a life sentence after being convicted of first degree murder in 1917. He brought a petition for *habeas corpus* alleging that the state was holding him in confinement without due process of law. He alleged that the evidence against him was fabricated and that the authorities had deliberately suppressed evidence which would have impeached and refuted the testimony against him. Like petitioners, the defendants in *Mooney* did not challenge the truth of these allegations. Instead, they argued that due process only required the prosecuting authorities to give notice to the defendant so that he had an opportunity to present his evidence. This Court disagreed:

> Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental

> conceptions of justice which lie at the base of our civil and political institutions. [citation omitted]. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

294 U.S. at 112.

In *Mooney*, the Court specifically discussed the government's use of the false evidence at trial. But certainly "fundamental conceptions of justice" include the notion that government officials will not fabricate evidence or use other tricks to try to deprive an American of his liberty. Other decisions of this Court since *Mooney* support this view, as the Court has held on several occasions that a criminal defendant's constitutional rights are violated when the government knowingly uses false evidence or deliberate deception to obtain his conviction and imprisonment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (When the

reliability of a given witness may well be determinative of guilt or innocence, the prosecution must disclose evidence affecting the credibility of that witness); *United States v. Agurs*, 427 U.S. 97, 107 (1976) (Duty to disclose material, exculpatory evidence exists even when no request for the information has been made); *Napue v. Illinois*, 360 U.S. 264 (1959) (failure of State to correct testimony known to be false violates due process); *Pyle v. Kansas*, 317 U.S. 213 (1942) (allegations of knowing use of perjured testimony and the suppression of evidence favorable to the accused constitutes charge of violation of constitutional rights). All of these cases show that the Constitution protects against such governmental cheating in criminal cases, and all predate the 1977-78 misconduct at issue here.

There can be no doubt that the State's cheating in criminal cases violates due process, no matter how much process is afforded. As this Court noted in *Brady v. Maryland*, *supra*, the government wins when justice is done, not by getting a conviction at any cost. The best procedures in the world will not protect a criminal defendant if the prosecutor is determined to violate this ethical obligation and the defendant's constitutional rights.

That is what happened here. County Attorney Richter, the county's highest law enforcement officer, wanted a conviction at all costs. He fabricated evidence along with Assistant County Attorney Hrvol and Council Bluffs police. Richter and Hrvol vouched for the false evidence in court. They conspired with police to hide their fabrication of evidence from the court and jury, just as they conspired to hide Gates and other real

suspects. Their purpose: these facts had to be hidden or the process might prevent their evil plan from succeeding.

The *Buckley II* court offered a clever hypothetical that no constitutional violation would occur if the prosecutor coerced and coached a witness statement and then put it in a drawer. See Pet. at 7. But no one fabricates evidence to put it in a drawer. They fabricate evidence to use it against the defendant. And such conduct violates fundamental justice – and the Constitution – every step of the way.

The *Buckley II* court also was wrong to suggest that a criminal defendant suffers no actual injury until the fabricated evidence is used at trial, as this ignores the fact that the fabricated evidence is often the basis for the defendant's arrest, pretrial detention and for the formal charges brought against him for the crime. That was certainly true here. But for the evidence these petitioners fabricated, no warrant would have been issued for Harrington and McGhee's arrest and they would not have been subjected to pretrial detention, formal charges, conviction or post-trial imprisonment.

B. Petitioners' absolute immunity during the judicial phase does not protect them against liability for fabricating evidence during the investigative phase.

The *Buckley II* court further erred by finding that the plaintiff in that case had no claim against the prosecutor for fabricating the evidence during the investigation because the prosecutor enjoyed absolute immunity for presenting the false evidence at trial.

Even petitioners admit this is error. They write at page 18 of their petition:

> It is well established that a prosecutor does not have absolute immunity during the *investigative* phase of a criminal proceeding, and that absolute immunity during the *judicial* phase does not "retrospectively" immunize earlier wrongful acts." *Buckley*, 509 U.S. at 276.

Yet petitioners argue that they cannot be liable for the wrongful conviction and subsequent imprisonment caused by the evidence they fabricated. The reason? Because they have absolute immunity for presenting at trial the evidence they had fabricated during the earlier investigation. In other words, they claim that their absolute immunity during the judicial phase extends "retrospectively" to immunize earlier wrongful acts. This is the very thing that petitioners admit well-established law forbids.

Specifically, this Court's decision in *Buckley I* forbids it. This Court held that prosecutors who fabricate evidence during a criminal investigation are acting like police and so are to be treated like police. Petitioners do not deny that a police officer who fabricates evidence and supplies it to a prosecutor is liable for all of the plaintiff's damages under Section 1983, including damages for wrongful conviction and imprisonment caused by the fabricated evidence. They cannot. In constitutional torts, a defendant is responsible for the natural consequences of his actions. *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled on other grounds,

Monell v. Dep't of Social Services, 436 U.S. 658 (1978). Under *Buckley I*, a prosecutor has that same liability when, as here, he investigates like a police officer and fabricates evidence.

This is true even if the prosecutor who fabricates the evidence is the one who later uses the fabricated evidence in court. 509 U.S. at 276.[4] Thus, the Eighth Circuit and the district court were exactly right to observe, based on the Second Circuit's decision in *Zahrey*, that "it would be a perverse doctrine of tort and constitutional law that would hold liable the [police officer] fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer [prosecutor] who enlists himself in a scheme to deprive a person of liberty." Pet. Appx. A at 18a; Pet. Appx. B at 108a.

Petitioners say the Eighth Circuit's decision improperly abrogated petitioners' absolute immunity for using fabricated evidence at trial. But again, they are not being sued for using the fabricated evidence at trial as prosecutors. Petitioners are being sued for fabricating the evidence while acting as investigators along with police. Police do not have immunity for such misconduct, and neither do prosecutors under this Court's decision in *Buckley I*.

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[4] Justice Kennedy agreed with the majority in *Buckley I* on this point: "I agree with the Court that the institution of a prosecution 'does not retroactively transform . . . work from the administrative into the prosecutorial . . .'" 509 U.S. at 289.

C. Petitioners' claim of a conflict among the circuits overstates the case.

Not surprisingly, *Buckley II* has not attracted much support since it was decided almost fifteen years ago in 1994. Petitioners have cited no other Seventh Circuit decision which followed *Buckley II*'s reasoning. In fact, Judge Easterbrook, the author of *Buckley II*, acknowledged in *Newsome v. McCabe*, 256 F.3d 747, 754 (7th Cir. 2001), that two circuits had rejected his *Buckley II* analysis, citing the Second Circuit's decision in *Zahrey v. Coffey*, *supra*, and the Tenth Circuit's in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997).

Judge Easterbrook also noted that Justice Thomas "expressed the view that *Buckley II* was wrongly decided" in *Michaels v. McGrath*, 531 U.S. 1118 (2001). *Id.* This refers to Justice Thomas's dissent from the denial of *certiorari* in *Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000), the only case that petitioners can cite as following *Buckley II* in the last fifteen years.[5]

In short, *Buckley II* is a trial balloon that did not fly, and there is no justification for this Court to further delay trial of this case to address it.

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[5] We note that the Third Circuit decided *Michaels* on June 5, 2000 and that the Second Circuit decided *Zahrey v. Coffey* about six weeks later on July 20, 2000. In this case, the Eighth Circuit reviewed *Zahrey* and found it persuasive. The Third Circuit might well have done the same had it been given the same opportunity.

D. The Court would not retreat from *Buckley I* to adopt *Buckley II*.

Under *Buckley II*, a prosecutor could fabricate evidence during a criminal investigation and then use it to convict the defendant and give him a long prison sentence. Under *Buckley II*, a court that found the prosecutor did these things would nevertheless have to dismiss the Section 1983 claims because the injury did not occur until trial when the heavy sentence was meted out. Such a result cannot be reconciled with the broad remedial purpose of Section 1983. Nor can it be reconciled with this Court's decision in *Buckley I* that a prosecutor who fabricates evidence during an investigation has the same liability as a police officer who does the same thing.

Another strange thing about the *Buckley II* rationale is that it reserves Constitutional protections for the smallest injuries while denying it to the most serious. Under *Buckley II*, Section 1983 would provide a remedy when a prosecutor uses excessive force and breaks a person's nose during a criminal investigation, or when he causes a short pretrial detention without probable cause. But if he fabricates evidence during the investigation which later causes the defendant to be wrongfully convicted and imprisoned for twenty-five years – or perhaps wrongfully executed – the victim has no remedy. Under those circumstances, the injury only occurred at trial, and that's protected by absolute immunity. Surely that is not and cannot be the law.

This Court observed in *Buckley I* that "we have been 'quite sparing' in recognizing absolute immunity

for state actors in this context." 509 U.S. at 269. This is the correct approach, as absolute anything leads to trouble. If this Court found that prosecutors could not be held liable under Section 1983 for fabricating evidence during a criminal investigation under any rationale (because absolute immunity protects everything a prosecutor does; because coercing a witness does not violate the defendant's rights; because the defendant only suffers injury from coerced testimony in the immunized setting of a trial), then a fundamental conception of justice – that the Constitution protects Americans and their liberty against cheating by prosecutors sworn to uphold the law – would no longer be fundamental. Immunity would become impunity. Prosecutors would be free to fabricate evidence during criminal investigations because they would know there was virtually no possibility of ever being punished for it. Indeed, prosecutors might choose to displace police when dirty work is required to take advantage of such a loophole.

True, there is a theoretical possibility of a prosecutor being prosecuted criminally, but such cases are rarer than hen's teeth. Who would have arrested petitioners in this case? Surely not the police they conspired with. Who would have prosecuted County Attorney Richter? Surely not Assistant County Attorney Hrvol. Police and prosecutors work in concert, and this case shows that, sadly, it is not always to the good. It took more than twenty years for the *Brady* violation to surface, and petitioners' manipulation of the witnesses remained hidden even longer. And even after the Iowa Supreme Court vacated Harrington's conviction on account of the *Brady* violations in 2003, there was still no criminal

investigation to determine whether police and prosecutors obstructed justice or otherwise acted criminally.

The truth is that bad police and bad prosecutors are held accountable in civil rights cases like this one or not at all. If prosecutors cannot be liable under Section 1983 for fabricating evidence during a criminal investigation as *Buckley II* held, impunity reigns. We do not believe that impunity is necessary for good prosecutors to do zealous, honest work. We do believe that the potential for civil liability will prevent some prosecutors from acting unconstitutionally. And we know that justice demands more than Harrington and McGhee's release from prison after twenty-five years. Justice demands that they be compensated for their injuries in full. Justice demands that petitioners be brought to account for what they did.

If this Court were to adopt *Buckley II* and hold that there is no section 1983 cause of action against a prosecutor for the wrongful conviction and imprisonment caused by his fabrication of evidence, it would take that fateful step from absolute immunity to absolute impunity. It would turn away from a fundamental conception of justice that the government will not try to take our liberty with false evidence. It would step back from its holding in *Buckley I* that a prosecutor who fabricates evidence during an investigation shares the same liability as the police officer he conspired with. And were this Court to find that a criminal defendant framed by prosecutors can only get out of prison, and cannot recover damages under Section 1983 for the years stolen from his life, it

would fail to enforce the purpose of Section 1983 to provide full compensation – particularly to African Americans – when they are the victims of unconstitutional actions by government officials.

Certainly this case is not a fit occasion for such steps. Petitioners admit they had no probable cause to believe Harrington and McGhee were guilty. They admit they fabricated evidence during the investigation to frame them anyway. They cannot deny they hid material exculpatory evidence as well; the Iowa Supreme Court so found. By this despicable conduct, petitioners doomed two innocent black teenagers to life sentences when they were set before an all-white jury for killing a retired white Police Captain. Each was falsely arrested, wrongfully convicted and wrongfully imprisoned for over twenty-five years as a result.

It is hard for us to imagine a more fitting case for the application of Section 1983. The facts shock the conscience. The only thing that would be more shocking is if this Court were to hold that Harrington and McGhee have no Section 1983 cause of action against prosecutors for their injuries. It is respectfully submitted that *Buckley I* is good law; the Eighth Circuit correctly applied it; and this case should proceed to trial.

III. The Eighth Circuit decision is supported by Supreme Court precedent.

Petitioners claim the Eighth Circuit erred in its November 21, 2008 decision when it based its decision on substantive due process. They did not always take this position. The Eighth Circuit's February 1, 2008

decision included the very same substantive due process analysis, and petitioners made no objection. Indeed, they conceded in footnote 2 of their petition for rehearing *en banc* after the February 1 ruling that plaintiffs were entitled to trial on their Section 1983 claims and only asked for dismissal of plaintiffs' state law claims on Eleventh Amendment grounds.[6]

Petitioners were right then and wrong now. The Eighth Circuit's substantive due process analysis is well-grounded in Supreme Court precedent. This Court has also assumed there is a Fourth Amendment malicious prosecution cause of action which fits the facts of this case. Thus, whether this case is based on substantive due process and/or the Fourth Amendment, it is clear that Harrington and McGhee have valid Section 1983 claims. Those claims should proceed to trial. There is no justification for this Court to further delay trial to review this case.

This Court held in *Albright v. Oliver*, 510 U.S. 266 (1994) (plurality opinion), that there is no substantive right of due process to be free from criminal prosecution

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[6] Petitioners do not seek *certiorari* on the Eleventh Amendment issue, and with good reason. This Court has held that the "most salient factor" in determining whether a person or entity is an "arm of the State" protected by the Eleventh Amendment is whether the judgment in the case will be paid from the State treasury. *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 (1994). There is absolutely no evidence that the State of Iowa will pay any judgment against petitioners in this case. Iowa statutes also show that County Attorney is a county office, and the Iowa Supreme Court has so held.

except upon probable cause. 510 U.S. at 268. But only a bad arrest, criminal charge and short pre-trial detention were at issue in that case. Albright was arrested for selling a substance that looked like cocaine on the basis of an allegedly unreliable witness. He voluntarily surrendered when he learned of the warrant for his arrest; bonded out; and the charges were dropped before trial. *Id.* There was no allegation that the defendants had fabricated the evidence used against Albright. Seven Justices saw *Albright* as a Fourth Amendment case, pure and simple, and refused to recognize a duplicative substantive due process violation on such facts.

But the facts of this case go far beyond those in *Albright*. Here, petitioners and police fabricated evidence and used that false evidence to cause not only a wrongful arrest pursuant to warrant, but also wrongful convictions and long imprisonments of innocent men. Such facts implicate the Due Process Clause. As Justice Stevens observed in his *Albright* dissent:

> Had petitioner's [Albright's] prosecution resulted in his conviction and incarceration, then there is no question but that the Due Process Clause would have been implicated; a central purpose of the Fourteenth Amendment was to deny States the power to impose this sort of deprivation of liberty until after completion of a fair trial.

510 U.S. at 294.

Justice Stevens correctly cited *Mooney* and the other cases cited above for the proposition that a state's compliance with facially valid procedures is not by itself sufficient to meet the demands of due process. When state actors knowingly use false testimony and other deliberate deception to deprive a criminal defendant of his liberty, they violate that defendant's right to substantive due process. That is exactly what petitioners did to Harrington and McGhee.

Further support is found in this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In that case, the Court rejected petitioners' view that all constitutional claims must be analyzed under a specific constitutional provision rather than substantive due process. Instead, the Court held that a claim must be analyzed under a specific constitutional provision if it "covers" that claim like the Fourth Amendment covered Albright's. But substantive due process is available if the claim is not "covered" by one specific provision. 523 U.S. at 843-44.

That is true here. Surely the Fourth Amendment is implicated by Harrington and McGhee's wrongful arrest pursuant to warrant and the wrongful initiation of legal proceedings against them. Both require probable cause under the Fourth Amendment, and probable cause requires "reasonably trustworthy information," *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Lies coerced and coached by police and prosecutors do not constitute "reasonably trustworthy information."

The Fourth Amendment has typically applied to pretrial arrests and detentions. *Albright v. Oliver*, 510

U.S. at 274 ("The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."). But the misconduct here went beyond that. Police and prosecutors also used the fabricated evidence to deprive Harrington and McGhee of a fair trial and to cause their wrongful convictions and imprisonments of over twenty-five years each. Further, Harrington and McGhee allege their constitutional right to the equal protection of the laws was violated in that they were singled out to be framed for the murder, at least in part, because of their race. Thus, the misconduct in this case is not covered by any single constitutional provision and so is appropriate for substantive due process analysis.

In *Moran v. Clarke*, 296 F.3d 638 (2002), the Eighth Circuit found a Section 1983 cause of action based on substantive due process arising from facts similar to those presented here, i.e., a law enforcement conspiracy to fabricate evidence to frame an innocent person for a crime. Relying on this Court's decision in *County of Sacramento*, the Eighth Circuit distinguished *Albright* and found that the fabrication of evidence is not "covered" by the Fourth Amendment and so is subject to substantive due process analysis:

> Unlike the facts of *Albright*, Moran, in his due process claim, offers evidence of a purposeful police conspiracy to manufacture, and the manufacture of, false evidence. Instead of simply allowing a weakly supported prosecution to proceed, Moran correctly asserts that the evidence can be read to show acts designed to falsely formulate a pretense

> of probable cause. Although the Fourth Amendment covers seizures, which would be satisfied by Moran's arrest, law enforcement's intentional creation of damaging facts would not fall within its ambit. *Cf. Albright*, 510 U.S. at 274-75, 114 S.Ct. 807; *Rogers v. City of Little Rock*, 152 F.3d 790, 796 (8th Cir. 1998) (stating that the violation there was "different in nature from one that [could] be analyzed under the fourth amendment reasonableness standard" because "[n]o degree of sexual assault by a police officer acting under color of statelaw could ever be proper"). Here, we see no specifically applicable constitutional remedy that provides Moran with explicit protection to a level sufficient to exclude substantive due process analysis.

296 F.3d at 647.

Like plaintiffs here, Moran also alleged that race played a role in the alleged misconduct. He claimed that black defendants conspired to frame him at least in part because he was white. The Eighth Circuit found that "[s]ingling out an individual for investigation or punishment because of race is suspect," citing *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 305 (1978). 296 F.3d at 645. There was no error in applying substantive due process analysis to such facts in *Moran*, or here.

In *County of Sacramento*, the Court stated that it has "emphasized time and again '[t]hat the touchstone of due process is protection of the individual against

arbitrary action of government." 523 U.S. at 845. The "threshold question is whether the behavior of the governmental officer is so egregious, so outrageous that it may fairly be said to shock the contemporary conscience." 523 U.S. at 847, n.8. The behavior which most probably supports a substantive due process claim is "conduct intended to injure in some way unjustifiable by any government interest," "deliberate decisions of government officials to deprive a person of life, liberty or property." 523 U.S. at 849.

Surely there is no error in the Eighth Circuit's finding that the conduct at issue here "shocks the conscience." Petitioners and police had a "cop killing" they needed to close with a conviction in an election year. They lacked probable cause to believe that Harrington and McGhee were guilty of the murder, but black defendants would be easiest to convict in Pottawattamie County. So they coerced and coached testimony to frame Harrington and McGhee for the murder rather than to pursue a real suspect like Gates. They hid their fabrication of the testimony tying Harrington and McGhee to the murder. They also hid the real suspects. In short, petitioners used the false evidence they manufactured to arrest, charge, convict and imprison two innocent black teens for over twenty-five years for a crime they did not commit. Nor was this a momentary lapse in judgment. Petitioners and their police co-conspirators worked for months on coercing and coaching the witnesses to lie against Harrington and McGhee. And they kept it secret for over twenty years. Every American is outraged by what they did. Every American would also be outraged if this Court were to find that such facts do not support a Section 1983 cause of action for all of Harrington and McGhee's injuries.

Petitioners claim that allowing Harrington and McGhee to recover damages for their entire injury under the Eighth Circuit's "continuous substantive due process violation theory" completely disregards any analysis of causation, as well as the requirement that false testimony at trial be evaluated for harmless error. Pet. at 16. We need not waste time on whether petitioners' conduct was harmless. The false testimony that petitioners manufactured was the only evidence tying McGhee to the murder. And, as that false evidence caused his wrongful arrest, conviction and long imprisonment, petitioners and the police did indeed cause a continuous injury extending from McGhee's November 1977 arrests through his release from prison in 2003. The broad remedial purpose of Section 1983 demands no less than full compensation for this injury.

This Court recognized the continuous, interconnected nature of injuries like McGhee's in *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, a plaintiff cannot bring suit under Section 1983 based on a claim that would render a conviction invalid until after that conviction has been overturned in other proceedings. 512 U.S. at 486-487. McGhee's claims are of that nature: He claims that he was arrested, detained, charged, convicted and imprisoned on the basis of evidence fabricated by police and prosecutors. Under *Heck*, their Section 1983 cause of action did not even accrue until after his conviction was vacated. 512 U.S. at 489-90.

Petitioners suggest that, at most, plaintiffs have claims under the Fourth Amendment and that their Section 1983 damages are limited to the detention from

arrest until the issuance of process or arraignment. Pet. at 14. But petitioners are again in error. This Court has suggested that there may be a Fourth Amendment malicious prosecution cause of action for wrongful conviction and post-trial imprisonment based on the wrongful institution of legal process. *Wallace v. Kato*, 549 U.S. 384, 389-90, 390 n. 2 (2007). McGhee states such a cause of action. He claims that legal proceedings were wrongfully instituted against him for the Schweer murder when he was arrested pursuant to warrant in November 1977. The Tenth Circuit observed in *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008), *cert. denied*, __ S.Ct. __, 2009 WL 498175 (March 2, 2009), that detention pursuant to arrest warrant is considered the institution of legal process at common law:

> In this case, Plaintiffs were detained pursuant to arrest warrants. At common law, the issuance of an arrest warrant represents a classic example of the institution of legal process. *See Restatement (Second) of Torts § 654* cmt. c (1977) ("Criminal proceedings are usually instituted by the issuance of some sort of process, *generally a warrant for arrest*, the purpose of which is to bring the accused before a magistrate in order for him to determine whether the accused shall be bound over for further action by a grand jury or for trial by a court." (emphasis added)). Plaintiffs' detention was thus preceded by the institution of legal process, triggering the malicious prosecution cause of action. *See* Michael Avery et al., *Police Misconduct: Law and Litigation* §2:10

> (2007 Westlaw; POLICEMISC database) ("The Supreme Court's analysis in *Wallace* . . . indicates that such claims should not be characterized as false arrest or false imprisonment, because detention of the subject is pursuant to legal process."). In challenging that process by alleging the officers knowingly supplied false information in affidavits for the warrants, Plaintiffs based their malicious prosecution claim on the Fourth Amendment right against unreasonable seizures.

528 F.3d at 799.

McGhee's entire detention came after that wrongful arrest pursuant to warrant in November 1977. It continued until his conviction was vacated in 2003 and he was released from prison. The Fourth Amendment prohibits unreasonable seizures, and McGhee remained unlawfully seized on the basis of fabricated evidence for more than twenty-five years.

Petitioners would like this Court to believe that Harrington and McGhee's claims are just like Wallace's. But this is untrue. First, Wallace's claim was only for detention without legal process: He was arrested without warrant. 549 U.S. at 389. This Court found that his false arrest claim would only support damages from his detention from arrest until he was brought before a magistrate and bound over for trial. 549 U.S. at 391. Further, Wallace abandoned his malicious prosecution claim under both state and federal law. 549 U.S. 390, n. 2. McGhee has not. He has sued prosecutors for all of

his injuries under Section 1983 based on violations of his rights under the Fourth Amendment, the Due Process Clause and the equal protection of the laws. His claims include the deprivation of liberty from his unlawful arrest in November 1977 until his release from prison in 2003.[7]

Thus, there can be no doubt that Harrington and McGhee have section 1983 claims against petitioners for their entire deprivation of liberty under substantive due process and/or the Fourth Amendment, as well as equal protection. There is also no doubt that petitioners have no immunity, absolute or qualified, against these claims. Harrington and McGhee's claims are ready for trial.

IV. This case needs to be tried as scheduled on August 3, 2009.

This case is here on a collateral order appeal. The district court denied petitioners' motion for summary judgment over two years ago, finding that Harrington and McGhee have Section 1983 causes of action and that petitioners have no immunity against them. The Eighth

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[7] In footnote 2, petitioners refer to their pending limitations motion in the district court based on *Wallace*. But Harrington and McGhee's Section 1983 claims are governed by *Heck*, not *Wallace*. They claim under Sec. 1983 that their arrests pursuant to legal process (warrants) *and* convictions were based on the fabricated evidence. Thus, they could not prove their Section 1983 claims without necessarily implying the invalidity of their convictions. Under *Heck*, their Sec. 1983 cause of action did not accrue, and the limitations period did not commence, until their convictions were overturned in 2003. They filed these suits within the applicable statute of limitations after that occurred.

Circuit agreed, first on February 1, 2008, and again after reconsideration on November 21, 2008. Yet here we sit, still writing briefs, our second trial date in jeopardy.[8]

Nor would a ruling in petitioners' favor on the immunity issue avoid trial. The district court denied the County's motion for summary judgment on plaintiffs' Section 1983 claim against it under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Pet. Appx. B at 148a-150a. The claim is based on the fact that the County's final policymaker for law enforcement, County Attorney Richter, was personally involved in the unconstitutional conduct. The County did not appeal this ruling.

Petitioners claim that Richter has absolute immunity against plaintiffs' claims. But absolute immunity only applies to Richter individually. The County does not enjoy absolute or qualified immunity. See *Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit*, 507 U.S. 163, 166 (1993) ("These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under § 1983."). Thus, plaintiffs are entitled to go to trial against the County regardless of the outcome of

[8] The district court denied petitioners' motion for summary judgment on February 23, 2007, about one week before trial, and the collateral order appeal ensued. After its November 21, 2008 opinion, the Eighth Circuit denied petitioners' motion to stay the mandate. At a January 8, 2009 status conference, the district court set the case for trial on August 3, 2009.

Richter's absolute immunity defense. *Certiorari* would be inappropriate under these circumstances.[9]

If I represented a corporate client, the two-year delay of this case at the pleadings stage probably would not matter so much. But McGhee is struggling. To him, our victories in the courts below have produced no benefits. He spent a long time in prison as an innocent man. He has a hard time getting a good job with a twenty-five year hole in his resume. He filed suit in federal court for compensation, for justice. And he waits and waits and waits while the lawyers argue about legal technicalities, seeming to ignore his catastrophic injuries and current suffering. It is as if he was brought to the emergency room with life-threatening traumatic injuries and been left in the waiting room to fill out forms.

A lawyer can always find something he would change in another lawyer's brief, and a judge can surely say the same about another judge's opinion. Respectfully, there is nothing about the decisions below to justify making these men wait any longer for their day in court. The facts of this case are already over 30 years old and they are not getting better with age. Sufficient time, money and effort have been expended to decide whether this is a case. There is no doubt that it is. It is time – past time – to give Harrington and McGhee a chance to prove it.

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[9] Plaintiffs also sued the police officers involved in the fabrication of evidence, as well as the City of Council Bluffs which employed them. The police did not appeal the denial of their qualified immunity defense, but the district court stayed trial of those claims until petitioners' appeal was concluded. These claims are also overdue for trial.

CONCLUSION

We respectfully ask that the petition for *certiorari* be denied so that trial can proceed as scheduled on August 3, 2009.

Respectfully submitted,

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In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

TERRY J. HARRINGTON
AND CURTIS W. MCGHEE JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEFS IN OPPOSITION

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MISCELLANEOUS

Jacob Paul Goldstein, Note, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 COLUM. L. REV. 643 (2006) 7

Respondents' briefs simply confirm the certworthiness of the question presented: whether a prosecutor's liability, if any, for procuring false evidence prior to an arrest or charges may be leveraged into liability for a wrongful conviction.

In answering yes, the Eighth Circuit sharply departed from other courts of appeals and from this Court's precedents. Although the courts below nominally acknowledged that a prosecutor has absolute immunity for using false evidence at trial, they effectively overrode that immunity with a "substantive due process" theory, under which false evidence works one, continuous constitutional violation starting before arrest and continuing through conviction and incarceration. They also borrowed—and expanded—the Second Circuit's theory of a constitutional "right," unknown in this Court's cases, "not to be deprived of liberty as a result of the fabrication of evidence by a [prosecutor] acting in an investigating capacity." See Pet. App. 18a; *Zahrey*, 221 F.3d at 349.

Petitioners recognize that respondents have suffered substantial harms. But respondents may not evade review of the decision below—and the circuit split it enlarges—by mounting an assault on the very principle of immunity (*e.g.*, McGhee Opp. 18-21) or dismissing it as a "legal technicalit[y]" (*id.* at 33). As this Court has recognized, the federal judiciary is not empowered to fashion compensation schemes for wrongful conviction in the absence of a cognizable cause of action under § 1983. *Briscoe* v. *LaHue*, 460 U.S. 325, 344 n.30 (1983). Moreover, upholding prosecutorial immunity principles in this case would not deprive respondents of a remedy because it would not affect their separate claims, governed by different principles, against police defendants.

Recognizing the importance of the issues raised by the Eighth Circuit's decision and the serious risk that it may wrongfully expose petitioners to trial and damages, Justice Alito ordered a stay on the proceedings below. See *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (stay is granted only where there is a "reasonable probability" that four Justices will vote to grant certiorari and a "fair prospect" that a majority of the Court will find that the decision below was erroneous). As *amici* federal and state prosecutor groups explain in their brief (1-6), the issues here have grave, far-reaching ramifications in an area of law marked by frequent litigation. This reply explains why respondents' arguments against review have no merit.

1. Respondents brush aside the circuit split that is widened and deepened by the Eighth Circuit's decision. Harrington (at 12) calls the split "illusory"; McGhee (at 3) belittles the Seventh Circuit's decision in *Buckley II* as "an isolated aberration." These characterizations do not withstand scrutiny. Moreover, McGhee's insistence (at 14-16) that *Buckley II* was wrongly decided and that the Eighth Circuit came to a better conclusion simply underscores the need for this Court's intervention.

The two-part holding in *Buckley II*—that procurement of false evidence during an investigation does not in itself violate a criminal defendant's constitutional rights, and that introduction of the same evidence by a prosecutor at trial is covered by absolute immunity—is far from an "aberration." In 2006, the Third Circuit applied *Buckley II*—together with its own decision in *Michaels*, which had followed *Buckley II*—in concluding that impermissible interrogation techniques used on third parties do not vio-

late a criminal defendant's constitutional rights. *Yarris* v. *County of Delaware*, 465 F.3d 129, 143 (3d Cir. 2006). Accordingly, the court held, officers who had conducted the interrogation in question were entitled to qualified immunity, and prosecutors who introduced the evidence were entitled to absolute immunity. *Ibid.*

Although it did not rely on *Buckley II*, the Ninth Circuit employed a similar analysis in *Milstein* v. *Cooley*, 257 F.3d 1004, 1012 (9th Cir. 2001). It held that a prosecutor was protected by absolute immunity where he had allegedly directed an investigator to sign a complaint, leading to a criminal information, even though the prosecutor knew the complaint was false.

To be sure, other courts have disagreed with the approaches of the Third, Seventh, and Ninth circuits. For example, in *Clanton* v. *Cooper*, 129 F.3d 1147, 1157 (10th Cir. 1997), the Tenth Circuit held that an unsuccessfully prosecuted defendant could pursue damages on the theory that a government officer's coercion of a statement from a third party nonetheless violated the defendant's Fourteenth Amendment rights. And the Second Circuit in *Zahrey* expressly rejected the core conclusion of *Buckley II*, 20 F.3d at 796, that "events not themselves supporting recovery under § 1983 do not become actionable because they lead to injurious acts for which the defendants possess absolute immunity." The Second Circuit established a dramatically different rule: that prosecutors are liable for harms they cause during the judicial phase of a proceeding (in that case, an indictment) because it is "reasonably foreseeable" that evidence they gather in their investigative role will be used in their advocacy role. *Zahrey*, 221 F.3d at 354.

Justice Thomas recognized that *Clanton* and *Zahrey* were incompatible with *Buckley II* and *Michaels* and urged that certiorari be granted to resolve the four-circuit conflict. *Michaels* v. *McGrath*, 531 U.S. 1118 (2001) (Thomas, J., dissenting from denial of certiorari). The Eighth Circuit's decision in this case exacerbates that conflict, and *Milstein* adds a further wrinkle.

In sum, the circuits are hopelessly fractured in their approaches to a prosecutor's liability for investigative acts that lead—actually, or just potentially—to harms during the judicial phase. This case presents a particularly strong vehicle for resolving that conflict. Unlike *Clanton* and *Zahrey*, which involved prosecutions that ended without convictions, the decision below is the first that would allow plaintiffs to pursue wrongful-conviction damages based on acts that were subject to qualified immunity.

2. Respondents contend that an outcome other than the one reached by the Eighth Circuit would conflict with this Court's decision in *Buckley*. But contrary to respondents' characterization, petitioners seek no "retreat from" *Buckley*. See McGhee Opp. 18. Petitioners do not confuse a prosecutor's investigative and advocacy roles; nor do they argue that absolute immunity should retrospectively immunize activities outside the judicial process.

Buckley does not address the critical question in this case: whether an investigating prosecutor who procures false evidence prior to an arrest or charges may be answerable in damages not just for wrongful *initial* detention, but for wrongful *conviction*. In answering yes, the Eighth Circuit effectively held that when a prosecutor commits a misdeed under qualified immunity, the consequences spread forward and

prospectively overcome absolute immunity for use of the evidence at trial. See Pet. App. 18a (prosecutor is liable for "deprivation of liberty" where he is "accused of *both* fabricating evidence and then *using* the fabricated evidence *at trial*") (emphasis added). Under the dissent's theory in *Buckley II*, which was adopted below, the initial procurement of false evidence "ripen[s] into a § 1983 cause of action" when the evidence is introduced. *Id.* at 107a (quoting *Buckley II*, 20 F.3d at 800 (Fairchild, J., dissenting)). Accordingly, McGhee concedes (at 25) that the reason the injury here "went beyond" false arrest was because the prosecutors "*also used* the fabricated evidence to deprive Harrington and McGhee of a *fair trial*" and thus "*to cause* their wrongful convictions" (emphasis added). *Buckley* supports no such theory of liability. Respondents' argument would effectively erase this Court's "function test" for prosecutorial immunity.

Respondents seek support for their view from *Milstein* and *Moore* v. *Valder*, 65 F.3d 189 (D.C. Cir. 1995). In reality, these decisions *undermine* respondents' position, and they provide examples of the type of exacting analysis that the Eighth Circuit failed to conduct.

In *Milstein*, the Ninth Circuit held that a prosecutor is not absolutely immune for fabrication of evidence. 257 F.3d at 1011. But it also recognized that absolute immunity for judicial proceedings could not be abridged even where criminal charges were based on a false complaint that a prosecutor had directed an investigator to sign. *Id.* at 1012. Thus, the Ninth Circuit did not endorse respondents' liability theory—which is also the theory of the Second Circuit and the courts below—that "[b]ut for" charges that

were based on false evidence, respondents would not have suffered harms later in the judicial process. (McGhee Opp. 14.)

In *Moore*, 65 F.3d at 194, the D.C. Circuit said that although absolute immunity would not apply to a prosecutor's "misuse of *investigative* techniques," the prosecutor's "decisions regarding what evidence to put before [a judicial proceeding], and in what manner" are absolutely immune under *Imbler*. There was no conviction or post-trial incarceration in *Moore*, and no theory that bad evidence could have "ripened" into some other violation. Thus, *Moore* cannot support the Eighth Circuit's conclusion that a wrongful investigation may expose prosecutors to the sort of unbounded liability that respondents seek license to pursue here.

Were respondents' claims limited to false arrest, immunity would be more fact-dependent. See *Buckley*, 509 U.S. at 274 (prosecutor does not have absolute immunity "before he has probable cause to have anyone arrested"); *cf. Milstein*, 257 F.3d at 1012 (absolute immunity applied where an arrest warrant followed from a criminal complaint for which prosecutor was immune, even though prosecutor knew the complaint was false). But injuries arising from a prosecution are "'entirely distinct'" from false arrest. *Wallace*, 549 U.S. at 390. Nothing in this Court's § 1983 jurisprudence suggests that liability for wrongful conviction may be founded on a wrongful investigation while disregarding all subsequent events during the judicial phase of a prosecution.

This issue is the crux of the conflict between the Eighth Circuit's decision in this case, which was grounded in the logic of *Zahrey*, and the rulings in

Buckley II, *Michaels*, and *Milstein*. The issue is a critical one and warrants review.

3. McGhee (at 29) frames the false-evidence issue in this case as one of Fourth Amendment malicious prosecution (although respondents' complaints do not allege state-law malicious prosecution against petitioners). The courts below, too, apparently (and incorrectly) viewed the false-evidence claim through a lens of wrongful institution of criminal proceedings. That would explain how the Eighth Circuit concluded that a prosecutor who is absolutely immune at trial could still face damages for wrongful conviction based on pre-arrest procurement of evidence.

The smuggling of malicious-prosecution concepts into this case provides an independent reason why certiorari should be granted. This Court recently noted that it has "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983" (*Wallace*, 549 U.S. at 390 n.2), and the circuits have taken widely divergent approaches. See Jacob Paul Goldstein, Note, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 COLUM. L. REV. 643, 653-659 (2006) (surveying the various approaches and concluding that "[t]he status of malicious prosecution as a constitutional tort is rife with confusion").

In this case, the Eighth Circuit echoed the Second Circuit's view in *Zahrey* that it would be "perverse" to "hold liable the [police officer] fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the [prosecutor] who enlists himself in a scheme to deprive a person of liberty." Pet. App. 18a. But such a scenario is not, as these Courts suggest, an anomaly. The act of procuring false evidence in itself violates no constitutional right (*Buckley*, 509

U.S. at 281 (Scalia, J., concurring)), but when the police officer hands the bad evidence to a prosecutor and charges ensue, the officer commits the common-law tort of wrongful institution of criminal proceedings. By contrast, in a § 1983 action, the prosecutor's charging decision is categorically immune under *Imbler,* even if the prosecutor knows the evidence is bad. See *Kalina*, 522 U.S. at 124-125.

This issue adds to the circuit split addressed above and in the petition. In *Buckley II*, 20 F.3d at 796-797, the Seventh Circuit explained that while a police officer could be liable for misleading a prosecutor, a prosecutor who himself procures bad evidence would *not* be liable, because any constitutional injury would result only from an immunized prosecutorial decision such as filing charges. See also *Lee* v. *Willins*, 617 F.2d 320, 322 (2d Cir. 1980) (where an investigating prosecutor procured false evidence, *Imbler* barred recovery for the criminal defendant's deprivation of liberty in having to stand trial). Such an analysis draws support from this Court's opinions in *Malley* v. *Briggs*, 475 U.S. 335, 342-343 (1986), which emphasized the different roles played by police officers and prosecutors in the judicial process, and *Kalina*, 522 U.S. at 129-131, which distinguished between acts performed by the same prosecutor in attesting to facts as a witness (which warranted qualified immunity) and initiating the prosecution (which had absolute immunity).

Thus, even if the Fourth Amendment supports a § 1983 action for malicious prosecution, allowing such a claim against a prosecutor in these circumstances would swallow up *Imbler*. It would defeat the very rationale for absolute immunity by exposing prosecutors to the risk of having their charging deci-

sions second-guessed in civil litigation. The Eighth Circuit's adoption of *Zahrey* and rejection of *Buckley II* makes that risk a reality and further supports this Court's review of the decision below.

4. Respondents rely on the statement in *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Harrington Opp. 13-14; McGhee Opp. 15-16. But that statement pertained to whether a § 1983 action requires a showing of specific intent. *Monroe*, 365 U.S. at 187. It does not authorize broad, generalized federal tort claims unmoored from specific federally protected rights.

A § 1983 plaintiff must show that state action deprived him of a "specific constitutional guarantee." *Paul* v. *Davis*, 424 U.S. 693, 700 (1976). Although there is certainly a procedural due process right not to be convicted based on false evidence, McGhee's discussion of *Mooney* (at 11-13) is unavailing because that case was about the kind of *trial* violation for which, under *Imbler*, a prosecutor is absolutely immune. Respondents' suggestion that a conviction is a "natural consequence[]" of the procurement of false evidence is simply an attempted end run around such trial immunity. There is no support from this Court for such a flawed theory of proximate cause.

Applying the common law tort principle of "natural consequences" in the way respondents suggest would fly in the face of this Court's teaching that § 1983 is not a "font of tort law." *Paul*, 424 U.S. at 701. It also would effectively abrogate a number of this Court's precedents, starting with the teaching of *Wallace* that a false arrest in violation of the Fourth Amendment does not "set the wheels in motion for

[a] subsequent conviction and detention." 549 U.S. at 391. And it would contradict this Court's repeated instruction that alleged constitutional violations must be described with particularity. See, *e.g.*, *Albright*, 510 U.S. at 273 (plurality opinion).

Nor may respondents rely on a sweeping theory of substantive due process to argue that procurement of false evidence set the wheels in motion for what they characterize as a "continuous injury" that extended from arrest through post-conviction relief. McGhee Opp. 28. In *Chavez* v. *Martinez*, this Court held that a statement given without *Miranda* warnings did not in itself violate a suspect's Fifth Amendment right against self-incrimination where the statement was never used in any criminal proceeding. 538 U.S. 760, 773 (2003). Although the Court said the suspect could pursue a substantive due process claim against police for coercing the statement while he was in severe pain, *id.* at 779-780, that proposition is far different from the one urged by respondents and endorsed by the court below: that substantive due process may effectively overcome absolute immunity and support liability where a prosecutor is "accused of both fabricating evidence and then using the fabricated evidence at trial." Pet. App. 18a.

5. Harrington suggests (at 24) that certiorari may be premature because this is an "interlocutory" (actually, a collateral-order doctrine) proceeding, and that trial "could yet obviate the need to address" the immunity issues in this case. Harrington misapprehends the principle of immunity: it is "*immunity from suit* rather than a mere defense to liability," and regardless of the outcome on the merits, immunity "is effectively lost if a case is erroneously per-

mitted to go to trial." *Scott* v. *Harris*, 127 S. Ct. 1769, 1773 n.2 (2007).

Respondents also wrongly contend that they are entitled to a trial against the county regardless of how the prosecutors' immunity defenses are resolved. Harrington Opp. 6; McGhee Opp. 32. Respondents' remaining claims against the county are based on indemnification, failure to train, and *Monell* theories. The viability of these claims necessarily depends on resolution of the issues in the petition and whether there remains any injury that is cognizable under § 1983.

6. Finally, respondents repeatedly say that petitioners "admit" the allegations against them; have "conceded Plaintiff[s'] version of the facts" (Harrington Opp. 10); have "waived" critical defenses (*id.* at 7); and "admit they had no probable cause" (McGhee Opp. 21). These assertions are false. Petitioners consistently have maintained that *even if* the alleged facts were true, respondents' claims must fail because petitioners are immune as a matter of law. Seizing on that "even if" position, plaintiffs moved in the district court to have all their allegations accepted as judicial or evidentiary admissions, a ploy that the district court rejected.[1]

---

[1] Nor did petitioners "concede[]" in the court of appeals that respondents "were entitled to trial on their Section 1983 claims." McGhee Opp. 22. McGhee refers to a rehearing request filed by petitioners which addressed state sovereign immunity issues unrelated to the federal issues here. What petitioners actually said in that filing was that sovereign immunity under Iowa law does not affect the separate federal claims. Acting on the rehearing petition, the Eighth Circuit vacated its initial opinion and issued the decision of November 21, 2008, which is the sub-

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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ject of this petition. The parts of the initial opinion dealing with federal immunity issues were unaffected.

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IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

TERRY J. HARRINGTON
AND CURTIS W. MCGHEE JR.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND NATIONAL DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the National Association of Assistant United States Attorneys and the National District Attorneys Association hereby move for leave to file the accompanying brief as *amici curiae* in support of petitioners.

The National Association of Assistant United States Attorneys is the voice of Assistant United States Attorneys in the Department of Justice and Congress, helping to safeguard justice and promote the interests of AUSAs. It was founded in 1993 to protect, promote, foster and advance the mission of AUSAs and their responsibilities in promoting and preserving the Constitution of the United States, encouraging loyalty and dedication among AUSAs in support of the Department of Justice, and encouraging the just enforcement of laws of the United States. It is the "bar association" for the more than 5400 AUSAs throughout the country and the U.S. territories.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The

association's mission is "[t]o be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement. NDAA also files *amicus* briefs on issues relevant to its members and mission, including briefs in this Court in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), and *Davis v. Washington*, 547 U.S. 813 (2006).

This motion is necessary because respondents' counsel have refused consent to the timely written request for consent to the filing of this brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Assistant United States Attorneys and the National District Attorneys Association submit this *amici curiae* brief in support of petitioners Pottawattamie County, Iowa, Joseph Hrvol, and David Richter. The interests of the *amici* are set out in the accompanying motion.

SUMMARY OF ARGUMENT

Certiorari is warranted because the question presented raises an important issue that is already the frequent subject of litigation, and which is even more likely to be frequently litigated if the decision below is permitted to stand. The prospect that prosecutors will face litigation and potential liability imposed by civil damages over the conduct of their official duties will chill prosecutorial efforts that are necessary to combat and deter crime. The increase in litigation will impose precisely the burdens on prosecutors – in terms of both time and money – that the doctrine of absolute immunity is intended to preclude.

---

[1] Pursuant to Rule 37.2, counsel for *amici* certifies that counsel of record for all parties received timely notice of its intention to file an *amici curiae* brief at least ten days prior to the due date for the *amici curiae* brief. A letter reflecting petitioners' consent to the filing of this brief is being lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Nor is the remedy sought by respondents in this case necessary to deter prosecutorial misconduct. To the contrary, prosecutors who engage in misconduct may be subject to discipline by a variety of institutions, including the prosecutors' offices themselves, state bar associations, and the judges before whom they appear. And in the most extreme cases, prosecutors may themselves face criminal sanctions for their misconduct.

ARGUMENT

I. The petition for certiorari demonstrates that certiorari is warranted because the two issues raised by petitioners – whether a criminal defendant's "substantive due process" rights are violated by the improper gathering of evidence and whether prosecutors are absolutely immune from liability for introducing that evidence against a criminal defendant at trial – arise frequently in litigation. *Amici* are aware of still other similar cases that demonstrate the recurring importance of the question presented. The fact that the allegations in this case are not outliers – but rather represent a common tactic for evading settled principles of absolute immunity – reinforces the conclusion that this Court's intervention is warranted.

In *Clanton v. Cooper*, 129 F.3d 1147 (1997), for example, the Tenth Circuit allowed a Section 1983 suit to proceed when the plaintiff alleged that a confession coerced from a witness resulted in the plaintiff's wrongful imprisonment. The court of appeals explained that the plaintiff could "contest the voluntariness of [the witness's] confession not based on any violation of the [witness's] constitutional

rights, but rather as a violation of her own Fourteenth Amendment right to due process." *Id.* at 1158. And in *Fox v. Tomczak*, No. 04 C 7309, 2006 WL 1157466, at *1 (N.D. Ill. Apr. 26, 2006), the court rejected a prosecutor's claim of absolute immunity and allowed a due process claim under Section 1983 to proceed, explaining that "[s]everal other circuit courts of appeal have found that there is a clearly established constitutional due process right not to be subjected to prosecution on the basis of false evidence that was deliberately fabricated by the government." *Id.* at *2 (citing Second Circuit's decision in *Zahrey v. Coffee*, 221 F.3d 342 (2000), along with decisions of the Ninth, First, Fourth, and Eighth Circuits); *see also, e.g.*, *Richir v. Village of Fredonia, N.Y.*, No. 05-CV-076, 2008 U.S. Dist. LEXIS 54012, at *2 (W.D.N.Y. July 14, 2008) (citing *Zahrey*, denying prosecutors' motion to dismiss with regard to claim that prosecutors "manufactured false and misleading evidence against her in violation of her right to due process").

Indeed, a district court in Michigan very recently considered – and denied absolute immunity in – a case virtually on all fours with this one. In *Koubriti v. Convertino*, No. 07-13678, 2008 U.S. Dist. LEXIS 107423, at *1 (E.D. Mich. Dec. 3, 2008), the court denied a motion to dismiss by a former Assistant U.S. Attorney accused by a former defendant of withholding exculpatory evidence and fabricating evidence. In so doing, the court rejected the defendant-prosecutor's "contention that it is only the use of this evidence, not its procurement that violates [the defendant's] substantive due process rights." Instead, the court explained, "[i]mmunity cannot

extend to actions by a prosecutor that violate a person's substantive due process rights by obtaining, manufacturing, coercing or fabricating evidence before filing formal charges, even if the subsequent use of that evidence is protected by absolute immunity." *Id.* at *14.

II. The court of appeals' ruling, if not reversed, will produce several entirely predictable negative consequences on ongoing prosecutorial efforts. First and foremost, it will lead to an increase in litigation against prosecutors, as criminal defendants will seek to circumvent the absolute immunity afforded to prosecutors at trial by shoehorning their allegations into claims focused on the allegedly improper procurement of evidence by prosecutors, notwithstanding that their convictions resulted from the prosecutor's use of that evidence at trial. As one district court explained in granting a motion to dismiss in a Section 1983 case alleging that prosecutors in that case (including now-Senator Arlen Specter) had "solicit[ed] and knowingly us[ed] perjured testimony" against a criminal defendant, "[t]o allow such an allegation to defeat the prosecutor's immunity would vitiate the *Imbler* [*v. Pachtman*, 424 U.S. 409 (1976)] holding. Anyone against whom perjured testimony was used could then force the prosecutor to court in a civil damage action simply by reframing the claim to allege that the perjured testimony was solicited." *Tate v. Grose*, 412 F. Supp. 487, 488 (E.D. Pa. 1976). *See also Weinstein v. Mueller*, 563 F. Supp. 923, 927 (N.D. Cal. 1982) (in case brought against then-AUSA Robert Mueller, who subsequently served as director of the FBI, citing *Tate* and finding "no difference here

between the knowing use of perjured testimony and the solicitation of it. If prosecutorial immunity did not cover the latter as well as the former, the protections of *Imbler* would disappear simply by the addition of another stock allegation.").

The inevitable consequence of the prospect of greater civil liability will be the chilling of the essential exercise of wholly constitutional efforts to prosecute criminal defendants. In the course of their daily work, prosecutors are frequently required to make dozens of decisions related to the prosecution of their caseload. As this Court has acknowledged, the prospect that a prosecutor will face liability for these decisions creates "the possibility that [the prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423; *see also id.* at 424-25 ("A prosecutor is duty bound to exercise his best judgment . . . . The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."). If this occurs, "[t]he work of the prosecutor would . . . be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." *Id.* at 424 (citing *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. App. 1935)). Indeed, the work of a prosecutor would be completely stymied if a defendant could file suit claiming a violation of civil rights whenever prosecutors seek to convince reluctant witnesses to testify notwithstanding efforts by the defendant to intimidate them – efforts that are unfortunately all too common in cases involving, for example, gangs or domestic violence.

An increase in litigation will also impose significant burdens on prosecutors in terms of both time and money – precisely the burdens that absolute immunity is intended to remove. In *Imbler*, 424 U.S. at 425, this Court reasoned that absolute immunity was appropriate because, "if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." Indeed, this Court recognized, absolute immunity was particularly appropriate for prosecutors because "suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor," who "would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials" because he "frequently act[s] under serious constraints of time and even information" and thus "inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.* at 425-26.

III. Contrary to respondent McGhee's assertion that "bad police and bad prosecutors are held accountable in civil rights cases like this one or not at all," McGhee BIO 20, the remedy sought by respondents (and upheld by the Eighth Circuit in this case) is not necessary "to deter objectionable prosecutorial conduct," because there are other "means more narrowly tailored to" do so. *United States v. Hasting*, 461 U.S. 499, 506 (1983). *Compare*

also, e.g., McGhee BIO 19 (positing that "[p]rosecutors would be free to fabricate evidence during criminal investigations because they would know there was virtually no possibility of ever being punished for it").

a. First, as the United States has recently explained, "[p]rosecutorial offices . . . often have their own internal mechanisms to address prosecutorial misconduct and ensure that prosecutors, including supervisors, meet the highest standards of ethical misconduct." Br. *Amicus Curiae* of U.S., *Van de Kamp v. Goldstein* (No. 07-854) at 32. At the federal level, the Department of Justice's Office of Professional Responsibility ("OPR") has responsibility for investigating "allegations of professional misconduct made against Department of Justice (DOJ) attorneys where the allegations relate to the exercise of the attorney's authority to investigate, litigate, or provide legal advice," including allegations similar to those at issue in this case. U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005, at 1 ("OPR 2005 Annual Report") (OPR investigates allegations that include violations of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and Federal Rule of Criminal Procedure 16, as well as allegations of improper coercion or intimidation of witnesses); *see also Hasting*, 461 U.S. at 506 n.5 (1983) ("Here, for example, the court could have dealt with the offending argument by asking the Department of Justice to initiate a disciplinary proceeding against him . . . . "). OPR – which is made up of twenty-two permanent career attorneys and several detailees from various U.S. Attorneys' offices – operates

independently within the Department of Justice, reporting directly to the Attorney General. *See* U.S. Dep't of Justice, *Office of Professional Responsibility*, *available at* www.usdoj.gov/opr/ (visited Mar. 19, 2009).

OPR's investigations of prosecutorial misconduct may arise from complaints from a variety of sources, including private attorneys and parties, judicial referrals, and self-reporting by Department employees. *See* OPR 2005 Annual Report 5. OPR itself also conducts regular searches of electronic databases to locate any judicial criticism of federal prosecutors. OPR reports the results of its investigations to the Office of the Deputy Attorney General and the relevant DOJ management officials, including "a recommended range of discipline" for attorneys who are found to have engaged in misconduct. DOJ officials are then responsible for imposing "any disciplinary action that may be appropriate," although they cannot depart from OPR's recommendations without advance notification to the Office of the Deputy Attorney General. *Id.* at 2. In the cases in which OPR found professional misconduct, disciplinary action that included suspensions and reprimands was initiated in nearly two-thirds of them.

b. At the federal, state, and local levels, prosecutors are also subject to discipline by state bar associations. As this Court explained in *Imbler*, 424 U.S. at 429, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the

imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."

When OPR concludes that federal prosecutors have engaged in misconduct – by finding either intentional misconduct or "that a subject attorney acted in reckless disregard of a professional obligation or standard," it automatically notifies "the bar counsel in each jurisdiction in which an attorney found to have committed professional misconduct is licensed," OPR 2005 Annual Report 3, of both the finding and any discipline imposed. OPR will also respond to "the bars' requests for additional information on those matters." The bar association (which, of course, could also learn of potential misconduct by federal prosecutors from independent sources, including the bar counsel's own review of judicial opinions) may conduct its own investigation of the misconduct, and may also decide to impose its own discipline.

State prosecutors are similarly subject to discipline by state bar associations for their misconduct. In Iowa, for example, petitioners as practicing attorneys were subject to several applicable Iowa Court Rules, including Rule 32.3.8(a) (prohibiting prosecutor from prosecuting a charge that he knows is not supported by probable cause) and Rule 32.3.8(d) (violation of Iowa Rules to knowingly fail to disclose exculpatory evidence). There is no statute of limitations for the filing of an attorney disciplinary complaint, which may be filed by "any person, firm, or other entity," Iowa Ct. R. 34.1, with the Iowa Supreme Court Attorney Disciplinary Board – which may also initiate an

investigation or disciplinary action on its own, Iowa Ct. R. 34.5. Possible sanctions could include a private admonition, public reprimand, or suspension or revocation of the prosecutor's law license. Iowa Ct. Rs. 34.11, 35.9, 36.16. *See, e.g.*, *Iowa S. Ct. Att'y Disciplinary Bd. v. Borth*, 728 N.W.2d 205 (Iowa 2007) (publicly reprimanding assistant county attorney with no prior ethical violations for misconduct that included violation of rule prohibiting prosecutors from undertaking criminal defense work and violating ethical rules in negotiating plea bargains); *Iowa S. Ct. Att'y Disciplinary Bd. v. Barry*, No. 08-1214, 2009 WL 415528, at *12 (Iowa Feb. 20, 2009) (law license of county attorney – who had already been removed from office – suspended indefinitely, with no possibility of reinstatement for one year; misconduct included making a series of illegal plea agreements that required defendants to donate money to sheriff's office, which then used money to "purchase weapons for the department, to pay [attorney's] cell phone bills, and to purchase a vehicle for [his] use").[2]

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[2] *See also* John Stevenson, *Nifong May Be Ouster No-Show*, Durham Herald-Sun, June 28, 2007, at A1 (prosecutor in Duke lacrosse case stripped of law license by North Carolina state bar); Dee J. Hall, *Clash of Lawyers Coming To A Head*, Wis. St. J., July 8, 2007, at A1 (prosecutor under investigation by state authorities for lying and withholding evidence from defense; could face public reprimand); Bill Moushey, *He's Free After 4 Hard Years*, Pittsburgh Post-Gazette, Dec. 2, 2006, at A1 (fired district attorney also reported to state disciplinary board for investigation).

c. Prosecutors may also face a variety of additional sanctions as a consequence of their misconduct. First and foremost, they may lose their jobs. This is true not only for line attorneys, but also for the chief prosecutor in a jurisdiction, who may be subject to removal from office under state law or – if elected – may be defeated at the polls. *See, e.g.*, Bill Moushey, *He's Free After 4 Hard Years,* Pittsburgh Post-Gazette, Dec. 2, 2006, at A1 (assistant district attorney fired for misconduct during cross-examination of key witness; charges against defendant dropped); *Iowa S. Ct. Att'y Disciplinary* Bd. *v. Barry*, No. 08-1214, 2009 WL 415528, at *1 (Iowa Feb. 20, 2009) (county attorney removed by county district court in light of finding that attorney had "breached his duties knowingly and with a purpose to do wrong"); John Stevenson, *Nifong May Be Ouster No-Show*, Durham Herald-Sun, June 28, 2007, at A1 (reporting on effort to seek removal of Duke lacrosse prosecutor under North Carolina law permitting chief judge in a jurisdiction to remove district attorneys for certain types of misconduct).

Second, prosecutors may be sanctioned by the judges before whom they appear. *See, e.g., United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983) ("The Court also could have publicly chastened the prosecutor by identifying him in his opinion."). Indeed, in the recent trial of Senator Ted Stevens, the district court held several federal prosecutors in contempt for their failure to turn over documents relating to alleged prosecutorial misconduct. Del Quentin Wilber, *6 Prosecutors No Longer Part Of*

Legal Team in Stevens Case, Wash. Post, Feb. 18, 2009, at A6.[3]

Third, in truly egregious cases, prosecutors may themselves face criminal sanctions for their misconduct. One recent example is the case of four Muslim men accused of being part of a "sleeper" terrorist cell in Detroit. When allegations of prosecutorial misconduct that included suppression of evidence later surfaced, the Department of Justice not only sought dismissal of all terrorism charges against the defendants, but it also brought criminal charges against the prosecutor himself for conspiring "to present false evidence at trial and to conceal inconsistent and potentially damaging evidence from the defendants." Eric Lichtblau, *Ex-Prosecutor In Terror Inquiry Is Indicted*, N.Y. Times, Mar. 30, 2006, at A18.

d. There is no evidence that the further prospect of civil liability is necessary to deter prosecutorial misconduct. A defendant who believes that he has been the subject of unlawful or unconstitutional actions by a prosecutor has complete and unfettered access to the existing disciplinary regimes applicable to state and local prosecutors. State officials, state bars, and judges all stand ready to ensure the proper functioning of the prosecutorial system. By contrast,

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[3] Those prosecutors were subsequently removed from the government's legal team addressing misconduct allegations, and OPR is apparently investigating the misconduct allegations and contempt findings. Mike Scarcella, *Sealed Court Records, Transcripts Released in Stevens Case*, The BLT: The Blog of Legal Times, Feb. 18, 2009.

the prospect that a prosecutor's interactions with a witness may later be second-guessed by a civil jury – often many years later, when recollections have failed and relevant evidence is no longer available – poses a direct threat to the orderly prosecutorial function.

CONCLUSION

For the foregoing reasons, as well as those outlined in the petition, certiorari should be granted. Alternatively, this Court should call for the views of the Solicitor General.

Respectfully submitted,

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March 23, 2009

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(6)

Supreme Court, U.S.
FILED
JUL 13 2009
OFFICE OF THE CLERK

No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

CURTIS W. MCGHEE JR.
AND TERRY J. HARRINGTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 18, 2009
CERTIORARI GRANTED APRIL 20, 2009

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Curtis W. McGhee, Jr. v. Pottawattamie County, Iowa, et al., No. 4:05-CV-00255

Relevant docket entries

Docket No.	Date	General Description
1	05/04/2005	COMPLAINT against all defendants, filed by Curtis W. McGhee, Jr. Rule 16 Notice of Dismissal set for 9/1/2005. Notice of Dismissal for lack of Service deadline set for 9/1/2005. (Attachments: #1 Complaint Signature Page 1#2 Complaint Signature Page 2) (Olson, Alan) (Entered: 05/04/2005)
36	12/01/2005	AMENDED ANSWER to Complaint (*First Amended Answer and Jury Demand of Defendants Pottawattamie County, City of Council Bluffs, Hrvol, Richter, Wilber, Larsen, Brown and Dawson to Complaint of Curtis W. McGhee, Jr.*) by David Stephen Baker on behalf of Pottawattamie County, Iowa, The City of Council Bluffs, Iowa, Joseph

Docket No.	Date	General Description
		HRVOL, DAVID RICHTER, WILBER MATTHEW, DANIEL LARSEN, LYLE BROWN, DAVID DAWSON. (Baker, David) (Entered: 12/01/2005)
95	09/29/2006	MOTION for Summary Judgment by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. Responses due by 10/23/2006 (Attachments: #1 Statement of Material Facts #2 Appendix) (Madsen, Kristopher) (Entered: 09/29/2006)
111	10/27/2006	RESPONSE to Motion re 95 MOTION for Summary Judgment filed by Curtis W. McGhee, Jr. Replies due by 11/8/2006. (Attachments: #1 Appendix Plaintiff McGhee's Appendix to Response to Defendants' Motion for Summary Judgment: OVERLENGTH Filed in paper form and maintained in the Clerk's Office in DSM) (Davis, Stephen) Modified on 11/2/2006 add appendix text (don,). (Entered: 10/27/2006)

Docket No.	Date	General Description
112	10/27/2006	RESPONSE to Motion re 95 MOTION for Summary Judgment *Response to Statement of Material Facts* filed by Curtis W. McGhee, Jr. Replies due by 11/8/2006. (Davis, Stephen) (Entered: 10/27/2006)
123	11/15/2006	Unresisted MOTION to file overlength brief *Reply Brief* Motions referred to Thomas J. Shields. by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. Responses due by 12/4/2006 (Attachments: #1 Reply Brief in Support of Motion for Summary Judgment) (Madsen, Kristopher) (Entered: 11/15/2006)
124	11/15/2006	AMENDED DOCUMENT by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. *Supplemental Appendix for Summary Judgment.* (Madsen, Kristopher) (Entered: 11/15/2006)
133	12/01/2006	MOTION for Leave to File *Surreply Brief on County And Prosecutors' Motion for Summary Judgment* Motions re-

Docket No.	Date	General Description
		ferred to Thomas J. Shields. by Curtis W. McGhee, Jr. Responses due by 12/18/2006 (Attachments: #1 Supplement Surreply Brief #2 Supplement Response to Defendants' Statements of Additional Facts #3 Appendix Supplemental Appendix in Response to Motion for Summary Judgment #4 Supplement Certificate of Service) (Davis, Stephen) (Entered: 12/01/2006)
	12/05/2006	PUBLIC DOCKET ANNOTATION Paper copies of Plaintiff's supplemental Appendix w/exhibits 42-101 received in Clerks Office Des Moines. (gk,) (Entered: 12/05/2006)
146	01/18/2007	MOTION To Join *Plaintiff Harrington's Rule 104 Motion for Judicial Admission of Fact* Motions referred to Thomas J. Shields. by Curtis W. McGhee, Jr. Responses due by 2/5/2007 (Attachments: #1 Supplement Memorandum in Support of Motion to Join) (Davis, Stephen) (Entered: 01/18/2007)
183	02/23/2007	ORDER granting in party and

Docket No.	Date	General Description
		denying in part 95 Motion for Summary Judgment; granting 99 Motion for Judgment on the Pleadings; granting in part and denying in part 100 Motion for Judgment as a Matter of Law; granting 133 Motion for Leave to File. Signed by Judge Robert W. Pratt on 02/23/2007. (mlm,) Modified on 02/23/2007 to edit text doc. #99 (id). (Entered: 02/23/2007)
188	02/27/2007	NOTICE OF INTERLOCUTORY APPEAL as to 183 Order on Motion for Summary Judgment, Order on Motion for Judgment on the Pleadings, Order on Motion for Judgment as a Matter of Law, Order on Motion for Leave to File,,,,by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER. Filing Fee $455, receipt number 403096. (Attachments: #1 Appellant's Form A) (Madsen, Kristopher) (Entered: 02/27/2007)
193	02/27/2007	ORDER ON MOTIONS. Signed by Judge Robert W. Pratt on 02/27/2007. (mlm,)

Docket No.	Date	General Description
		(Entered: 02/27/2007)
211	03/02/2007	MOTION for Judgment on the Pleadings (*Brief in support thereof*) 202 by Pottawattamie County, Iowa. Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. Responses due by 03/19/2007 (Madsen, Kristopher) Modified on 3/5/2007 to include link to original motion (rmj). (Entered: 03/02/2007)
212	03/08/2007	NOTICE OF INTERLOCUTORY APPEAL as to 183 Order on Motion for Summary Judgment, Order on Motion for Judgment on the Pleadings, Order on Motion for Judgment as a Matter of Law, Order on Motion for Leave to File,,,, by Pottawattamie County, Iowa, Joseph HRVOL, DAVID RICHTER, WILBER MATTHEW. Filing fee $455, receipt number 407963. (Attachments: #1 Appellant's Form A) (Madsen, Kristoher) (Entered: 03/08/2007)
217	03/19/2007	RESPONSE to Motion re 211 MOTION for Judgment on the Pleadings (*Brief in support*

Docket No.	Date	General Description
		thereof) MOTION for Judgment on the Pleadings (*Brief in support thereof*), 201 MOTION in Limine *Re Damages Plaintiffs' Joint Brief in Opposition to Defendants' Motion for Judgment on the Pleadings Under Wallace v. Kato And in Response to Their Motion in Limine Regarding Damages* filed by Curtis W. McGhee, Jr. Replies due by 3/29/2007. (Davis, Stephen) (Entered: 03/19/2007)
228	04/10/2007	Joint MOTION for Leave to File *Plaintiffs' Surreply on County, Hrvol & Richter's Motion for Judgment on the Pleadings Under Wallace v. Kato* Motions referred to Thomas J. Shields. by Curtis W. McGhee, Jr. Responses due by 4/27/2007 (Attachments: #1 Surreply #2 Exhibit 1-3) (Davis, Stephen) (Entered: 04/10/2007)

Docket No.	Date	General Description
232	04/27/2007	BRIEF of *Pottawattamie County, Joseph Hrvol, and David Richter in Opposition to Plaintiffs' Motion to File Joint Surreply*. (Madsen, Kristopher) (Entered: 04/27/2007)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Terry Harrington v. Pottawattamie County, Iowa, et al., No. 4:05-CV-00178

Relevant docket entries

Docket No.	Date	General Description
1	03/25/2005	COMPLAINT against all defendants, filed by Terry Harrington. Rule 16 Notice of Dismissal set for 7/25/2005. Notice of Dismissal for lack of Service deadline set for 7/25/2006. (McCalla, J) (Entered: 03/25/2005).
47	12/01/2005	AMENDED ANSWER to Complaint (*First Amended Answer and Jury Demand of Defendants Pottawattamie County, City of Council Bluffs, Richter, Hrvol, Larsen and Brown to Complaint of Terry Harrington*) by David Stephen Baker on behalf of Council Bluffs, IA, City of, David E. Richter, Joseph J. Hrvol, Daniel C. Larsen, Lyle W. Brown, Pottawattamie County, Iowa. (Baker, David) (En-

Docket No.	Date	General Description
		tered: 12/01/2005)
93	10/03/2006	MOTION for Summary Judgment by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. Responses due by 10/27/2006 (Attachments: #1 Statement of Material Facts #2 Appendix) (Madsen, Kristopher) (Entered: 10/03/2006)
101	10/27/2006	NOTICE by Terry Harrington *to Supplement Record (attachments to Notice being mailed via U.S. Mail)* (Orchard, Mel) (Entered: 10/27/2006)
102	10/27/2006	RESPONSE to Motion re 93 MOTION for Summary Judgment (*statement of material facts by Pottawattamie County and Prosecutors Hrvol, Richter and Wilber*) filed by Terry Harrington. Replies due by 11/8/2006. (Orchard, Mel) (Entered: 10/27/2006)
104	10/27/2006	RESPONSE to Motion re 93 MOTION for Summary Judgment *Additional 340 pages to follow via Federal Express* filed by Terry Harrington. Replies due by 11/8/2006. (At-

Docket No.	Date	General Description
		tachments: #1 Appendix) (Orchard, Mel) (Entered: 10/27/2006)
105	10/27/2006	RESPONSE to Motion re 93 MOTION for Summary Judgment filed by Terry Harrington. Replies due by 11/8/2006. (Attachments: #1 #2) (Orchard, Mel) (Entered: 10/27/2006)
	10/30/2006	PUBLIC DOCKET ANNOTATION; appendix to pltff Harrington's response to motion for summary judgment by Pottawattamie County etc – see doc 105-3 – received in paper form this date in the clerk's office and will be maintained in the clerk's office (ljf) (Entered: 10/30/2006)
	10/30/2006	PUBLIC DOCKET ANNOTATION; plaintiff Harrington's notice of supplemental record – see doc 101 – received this date in paper form in the clerk's office and will be maintained in the clerk's office. (ljf,) (Entered: 10/30/2006)
111	11/15/2006	Unresisted MOTION to file overlength brief *Reply Brief* Motions referred to Thomas J.

Docket No.	Date	General Description
		Shields, by David E. Richter, Joseph J. Hrvol, Pottawattamie county, Iowa. Responses due by 12/4/2006 (Attachments: #1 Reply Brief in Support of Motion for Summary Judgment) (Madsen, Kristopher) (Entered: 11/15/2006)
112	11/15/2006	REPLY *to Harrington's Statement of Additional Facts* re 102 Response to Motion filed by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. (Madsen, Kristopher) (Entered: 11/15/2006)
113	11/15/2006	AMENDED DOCUMENT by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. *Supplemental Appendix for Summary Judgment.* (Madsen, Kristopher) (Entered: 11/15/2006)
115	11/20/2006	REPLY Brief re 93 MOTION for Summary Judgment filed by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. (dv,) (Entered: 11/20/2006)
123	01/16/2007	MOTION Rule 104 Motion for Judicial Admission of Fact Motions referred to Thomas J.

Docket No.	Date	General Description
		Shields. by Terry Harrington. Responses due by 2/2/2007 (Attachments: #1 Exhibit Exhibit A to Plaintiff Terry Harrington's Rule 104 Motion for Judicial Admission of Fact #2 Exhibit Exhibit B to Plaintiff Terry Harrington's Rule 104 Motion for Judicial Admission of Fact) (Orchard, Mel) (Entered: 01/16/2007)
135	01/30/2007	RESPONSE to Motion re 123 MOTION Rule 104 Motion for Judicial Admission of Fact filed by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. Replies due by 2/9/2007. (Livingston, Robert) (Entered: 01/30/2007)
150	02/09/2007	REPLY *Plaintiff Reply to Defendants Resistance to Harrington's Rule 104 Motion for Judicial Admission of Fact* re 135 Response to Motion filed by Terry Harrington. (Orchard, Mel) (Entered: 02/09/2007)
174	02/23/2007	ORDER granting in part and denying in part 90 Motion for Judgment on the Pleadings; granting in part and denying

Docket No.	Date	General Description
		in part 93 Motion for Summary Judgment. Signed by Judge Robert W. Pratt on 2/23/2007. (mlm,) (Entered: 02/23/2007)
176	02/23/2007	Proposed Pretrial Order *Joint Proposed Pretrial Conference Order* by Terry Harrington. (Attachments: #1 Exhibit Plaintiff Terry Harrington's Exhibit List #2 Exhibit Plaintiff Curtis McGhee's Exhibit List #3 Exhibit Defendant's Joint Exhibit List) (Orchard, Mel) (Entered: 02/23/2007)
185	02/26/2007	NOTICE OF INTERLOCUTORY APPEAL as to 174 Order on Motion for Judgment on the Pleadings, Order on Motion for Summary Judgment by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. Filing fee $455, receipt number 402961. (Attachments: #1 Appellant's Form A) (Madsen, Kristopher) (Entered: 02/26/2007)
191	02/27/2007	ORDER ON MOTIONS. Signed by Judge Robert W. Pratt on 2/27/2007. (mlm,) (Entered: 02/27/2007)

Docket No.	Date	General Description
211	03/02/2007	MOTION for Judgment on the Pleadings (*Brief in support thereof*) by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. Responses due by 3/19/2007 (Madsen, Kristopher) (Entered: 03/02/2007)
215	03/19/2007	RESPONSE to Motion re 211 MOTION for Judgment on the Pleadings (*Brief in support thereof*), 197 MOTION in Limine *Re Damages Plaintiffs' Joint Brief in Opposition to Defendant's Motion for Judgment on the Pleadings Under Wallace v. Kato And in Response to Their Motion in Limine Regarding Damages* filed by Terry Harrington. Replies due by 3/29/2007. (Davis, Stephen) (Entered: 03/19/2007)
222	03/29/2007	REPLY *Brief in Support of 12(c) Motion for Judgment on the Pleadings under Wallace v. Kato* re 196 MOTION for Judgment on the Pleadings *re Wallace statute of limitations* filed by David E. Richter, Joseph J. Hrvol, Pottawattamie County, Iowa. (Madsen, Kris-

Docket No.	Date	General Description
		topher) (Entered: 03/29/2007)
225	04/10/2007	Joint MOTION for Leave to File *Plaintiffs' Surreply on County, Hrvol & Richter's Motion for Judgment on the Pleadings Under Wallace v. Kato* Motions referred to Thomas J. Shields. by Terry Harrington. Responses due by 4/27/2007 (Attachments: #1 Surreply #2 Exhibit 1-3) (Davis, Stephen) (Entered: 04/10/2007)
229	04/27/2007	BRIEF of *Pottawattamie County, Joseph Hrvol, David Richter in Opposition to Plaintiffs' Motion to File Joint Surreply*. (Madsen, Kristopher) (Entered: 04/27/2007)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Curtis W. McGhee, Jr., et al. v. Pottawattamie County, Iowa, et al., Nos. 07-1453, 07-1524

Relevant docket entries

Date	General Description
03/09/2007	Originating court document filed consisting of notice of appeal, docket entries, and order dated 2/23/07. [3286662] [07-1524] (BNS)
11/15/2007	ARGUED & SUBMITTED in St. Louis to Judges William Jay Riley; A. Wallace Tashima; Lavenski R. Smith. Mr. Stephen Sanders for Appellants Pottawattamie County, David Richter, Mr. Joseph Hrvol and County of Pottawattamie, Mr. Stephen D. Davis for Appellee Mr. Curtis W. McGhee, Jr. and Mr. Mel C. Orchard, III for Appellee Mr. Terry Harrington in 07-1453, Mr. Stephen Sanders for Appellant Mr. Matthew Wilber, Mr. Stephen D. Davis for Appellee Mr. Curtis W. McGhee, Jr. and Mr. Mel C. Orchard, III for Appellee Mr. Terry Harrington in 07-1524. Rebuttal by Mr. Stephen Sanders for Pottawattamie County, David Richter, Mr. Joseph Hrvol and County of Pottawattamie in 07-1453, Mr. Stephen

Date	General Description
	Sanders for Mr. Matthew Wilber in 07-1524 RECORDED [3373204] [07-1453, 07-1524] (BWB)
02/01/2008	OPINION FILED – THE COURT: WILLIAM JAY RILEY, A. WALLACE TASHIMA and LAVENSKI R. SMITH. William Jay Riley, Authoring Judge (PUBLISHED) [3398008] [07-1453, 07-1524] (PAW)
02/01/2008	JUDGMENT FILED – The judgment of the originating court is AFFIRMED in part and REVERSED in part in accordance with the opinion. WILLIAM JAY RILEY, A. WALLACE TASHIMA and LAVENSKI R. SMITH Hrg Nov 2007 [3398014] [07-1453, 07-1524] (PAW)
02/29/2008	PETITION for enbanc rehearing filed by Appellants County of Pottawattamie, Mr. Joseph Hrvol, Mr. Joseph Hrvol, Pottawattamie County, David Richter and David Richter in 07-1453, w/service 02/29/2008. [3408454] [07-1453, 07-1524] (SS)
03/20/2008	CLERK LETTER sent notifying that party has an opportunity to respond to [3408454-2]: petition for enbanc rehearing. [3415193] [07-1453, 07-1524] (PAW)

Date	General Description
03/31/2008	RESPONSE in opposition to petition for enbanc rehearing, [3408454-2] filed by Appellee Mr. Curtis W. McGhee, Jr. in 07-1453, w/service 03/31/2008. [3418632] [07-1524, 07-1453] (WHJ)
03/31/2008	RESPONSE in opposition to petition for enbanc rehearing, [3408454-2] filed by Appellee Mr. Terry Harrington in 07-1453, 07-1524, w/service 03/31/2008. [3418755] [07-1453, 07-1524] (MCO)
04/11/2008	REPLY to response, [3418755-2], filed by Appellant Pottawattamie County in 07-1453. w/service 04/07/2008. [3422836] [07-1453, 07-1524] (PAW)
04/22/2008	JUDGE ORDER: Granting [3423930-2] motion to file a surreply filed by Appellee Mr. Terry Harrington. in 07-1453 Hrg Nov 2007 [3425977] [07-1453, 07-1524] (Paw)
05/15/2008	CASE REOPENED 1 REOPEN [07-1453, 07-1524] (PAW)
05/15/2008	CASE SUBMITTED On the briefs not on calendar before Judges William Jay Riley, A. Wallace Tashima, Lavenski R. Smith (Panel case data updated for cases: 07-1453) in St. Louis [07-1453, 07-1524] (PAW)
11/21/2008	OPINION FILED – THE COURT: WILLIAM JAY RILEY, A. WALLACE TASHIMA and LAVENSKI R. SMITH.

Date	General Description
	William Jay Riley, Authoring Judge (PUBLISHED) [3492337] [07-1453, 07-1524] (PAW)
11/21/2008	JUDGMENT FILED – The judgment of the originating court is AFFIRMED in part, REVERSED in part and REMANDED in accordance with the opinion. WILLIAM JAY RILEY, A. WALLACE TASHIMA and LAVENSKI R. SMITH Hrg May 2008 [3492354] [07-1453, 07-1524] (PAW)
12/19/2008	MANDATE ISSUED. [3500776] [07-1453, 07-1524] (CMD)
04/29/2009	SUPREME COURT order filed granting cert petition. Order filed on 04/20/2009. [3541922] [07-1453, 07-1524] (PAW)

SUPPLEMENTARY REPORT

Council Bluffs, Iowa

	Control No.: G77- R.B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77, 0732 hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): SCHWEER, JOHN
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 7-28-77 1300 hrs.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

At 1330 hours, July 26, 1977, Sergeant L. Williams, Detective L. Howlet and County Attorney Dave Richter reinterviewed Mr. J.H. (Jim) Burke of the Northwestern Bell Telephone Company. The interview was conducted at that location.

Information received during this interview was very similar to that received by Detective L. Brown. Mr. Burke stated that the subject he observed was very definitely wearing bib overalls as he observed the straps where they crossed in back. The subject was wearing a darker colored shirt garment under the straps of the overalls as they were visible. The subject was wearing some type of cap similar in de-

sign to a baseball cap. The subject was carrying a shotgun.

Mr. Burke stated later that same evening in a telephone conversation, that in his opinion the subject was dressed similar to a railroader.

Report Typed By: Nancy Geise	Date: 7-28-77
Time: 1345 hrs	Disposition of Case:
Approved By: _____	Sgt. L. Williams _____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R.B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77, 0732 hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): SCHWEER, JOHN
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 7-28-77 1300 hrs.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

The following interview was conducted by Sergeant L. Williams, Detective L. Howlett and County Attorney Dave Richter.

On July 26, 1977 at 1446 hours David Charles Waide, age 21 years, DOB 7-16-56, 3510 North 9th Street, Carter Lake; employed by P.A.W.S. since January, 1977 was interviewed both at the P.A.W.S. Office, 2821 South 15th Street and in the Detective Bureau.

Interview was conducted concerning subjects observed walking dogs in the South section of town or mainly that neighborhood.

After discovering that Mr. Waide had in fact observed a subject on several occassions; he was asked to come to the Detective Bureau where he did positively identify a recent color photograph of GATES, CHARLES RICHARD, SS# 505-32-2631. Mr. Waide stated that his observations of Mr. Gates on several occassions were in the area of 23rd Avenue and 6th Street and also on several occassions in the area of 28th Avenue and the Indian Creek dike. On these occassions he observed Mr. Gates walking a dog or dogs. He stated he has observed Mr. Gates on at least one occassion walk a doberman; on one occassion a german shepherd, and he thought on one occassion a golden retriever. These observations were made during the evening hours and was last observed last Tuesday (July 19, 1977) near the 28th Avenue and Indian Creek Bridge walking one dog. Mr. Waide stated that he has observed Mr. Gates in various attire, but does not recall any particular attire other than his hat. Mr. Waide stated that he was wearing a hat that was described quite possibly as being the hat he was wearing in the photograph.

Report Typed By: Nancy Geise	Date: 7-28-77
Time: 1530 hrs	Disposition of Case:
Approved By: _____	/s/ _____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R.B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77, 0732 hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): SCHWEER, JOHN LLOYD
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 8-11-77 1241 hrs.	Evidence turned over to: Property Management Ident BCI

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

SYNOPSIS

This report will contain the details of an investigation into a background check on suspect, GATES, Charles Richard, DOB 5-5-30, 5'7", 178 lbs., brown hair, green eyes. Photos on file with CID taken prior to his interrogation by Detective Sergeant Dieatrick and Officers Mitchell, Chapin, Williams, etc.

PERSONS AND PLACES MENTIONED IN THIS REPORT

SUSPECT: GATES, Charles R.
Address: (driver's license Nebraska) 5120 South 21st Street, Omaha, Nebraska.
DOB: 5-5-30
Brown hair, green eyes, 5'7", 178 lbs.
SS# 505-32-6631

4105 South 11th – known address of above suspect during period of approximately July 1976 thru July 1977

2705 South 15th Street, Omaha, Nebraska – residence where suspect GATES, Charles R. vehicle is registered under corporate name Environmental Security Commission, known address of GATES, Charles R. prior to July 1966.

Detective Sergeant Charles Parker, Omaha Police Division

Detective Dennis Taylor, Omaha Police Division

DETAILS

Reporting officer with the intention of performing a complete background on suspect, GATES, Charles R. proceeded to the Omaha Police Department, Criminal Investigation Division and there spoke with Homicide Sergeant Charles Parker. Explaining to Sergeant Parker the progression of this investigation and mentioning suspect, GATES, Charles R. I learned that he, GATES, Charles R. is a suspect in a 1963 Omaha Police Division [Page 2] Homicide case which remains open. This case is Emily Geland homicide occuring 4-9-63. Detective Sergeant Parker called for two detectives familiar with the case, Detective Taylor, Dennis and his partner Detective Miller. I explained that suspect,

GATES, Charles R. had been given a polygraph examination by Confidential Polygraph Service, Omaha, Nebraska and it was the written opinion contained as an addendum to this report under heading "Test Results" that suspect GATES was not truthful in his denial of owning a shotgun or having shot John Schweer. I explained that I would like to do a neighborhood search for information about suspect, GATES, Charles R. in the area of 2705 South 15th, the address where his vehicle a 1961 Mercury Comet tudor handpainted black and white with a roof rack and Strongheart Brand Dog emblems on the door and a roof rack indicating it as some sort of police or security vehicle. The license number on this 1961 Mercury tudor comet is Nebraska 1-D6170. Detective Taylor asked if I were familiar with the Emily Geland homicide case and I replied that I had read the original offense and one or two supplements one of which implicated Mr. GATES, Charles R. I explained that I was familiar with the offense implicating Gates as a suspect in the Geland homicide as being Mrs. Charolett Taylor, 4330 Emmett Street, no PBX, employed at Ralph Printing, 19th and St. Mary's. I was familiar that this report was dated 4-10-63 and that Mrs. Taylor was then currently employed by Ralph Printing as was GATES, Charles R. In the report indications are made that GATES acted in a very suspicious manner while employed at the printing company and that his actions towards women indicated something of very unnatural form.

I also indicated to Detective Taylor that I would like to do a neighborhood search for information in the area of 5120 South 21st Street, Omaha, Nebraska for purposes of background investigation on GATES, Charles R.. This due to the fact that that address is contained on his currently valid Ne-

braska's Driver's License. Detective Taylor informed me that that neighborhood had already been done in reference to the Geland homicide with absolutely negative results and no one in the area knowing GATES, Charles R. or his actions. [page 3]

I accompanied Detective Taylor, Dennis to the area of 2705 South 15th Street. We found the house at that residence on the corner of 15th and Bancroft was listed for sale by Crown Realty, PBX 393-2121, Agent Russ Hansen, PBX 558-4338. Detective Taylor utilizing the OPD Computer facilities was able to learn that the residential property taxes on that particular property came back to Norbert Lenz, 3822 California, Omaha, Nebraska.

Upon arrival at the scene Detective Taylor and I approached the house and learned that there were no persons living within, no furniture, no drapes, and the house appeared as though it were undergoing a renovation. In checking next door, first house south, no address listed on the house we learned that the persons occupying that house had lived at 2705 South 15th but had not known GATES and had moved in immediately after his vacating the premises. We learned that there was little if any cleanup necessary by the new occupants upon moving in, the lady we spoke to was very hesitant to converse with Police Officers and did refuse to give her name at that time. She refused to give a reason for feeling this way. We then checked several other houses in the neighborhood and learned that persons knew that GATES lived there, not knowing his name, only knowing him by description and actions. Each resident related that GATES appeared to be a "spooky type individual". That he had three dogs which appeared as though they could have been extremely

mean. They said he walked the dogs constantly. They remarked about his manner of dress and his living habits, mentioning that he was strictly a loner and they never saw visitors in or around the household. GATES was never seen by any of the neighbors accompanying any other human, only his dogs. We spoke with Mr. and Mrs. Patrick Pope, 2634 South 15th, PBX 342-3480, who seemed to be very familiar with GATES and his actions. Mr. and Mrs. Pope in our interview related that GATES appeared to be a strange individual who loved animals, dressed in a strange fashion, and had acquired very strange living habits. We asked them to elaborate on this. They explained that GATES, never had company, would not answer the door for salesmen or any one traveling door-to-door for any purpose. That he drove a early 1960's Mercury comet which had a very strange paint job, being black on the fenders white on the doors and top with a roof rack [Page 4] and a set of top lights consisting of backup or turn signal type lights made for larger type trucks. The front doors of this vehicle had some sort of picture of a dog and the words "Iowa Environmental Security Commission". Mr. and Mrs. Pope related that they felt that GATES must have some sort of Company or job involving being a Security Guard or possibly being involved with the Armed Forces due to the fact that he continually work Army Khaki type clothing. They noted that in the winter time he wore a white hooded coat and always walked his dogs year round no matter what the weather. They related that GATES always chained the dogs to himself with chains or cloth webbing type leashes. Under questioning Mr. Pope related that he saw Mr. Gates at one time wearing a pistol type holester on a wide black belt around his waist. He was unable to determine whether or not the holester

contained a sidearm, because of the fact he thought the holester was of a flap type. Under questioning Mr. and Mrs. Pope related that they had never seen GATES, Charles R. with a shotgun. Mr. and Mrs. Pope were shown photographs taken by the Council Bluffs Police Department with a Polaroid SX70 camera illustrating GATES wearing a straw cowboy type Mexican hat with a chin type drawstring and without that hat from close up and distance. They related that this was indeed the man who had lived across the street from their residence at 2634 South 15th, Omaha, Nebraska.

Detective Taylor and reporting officer then proceeded to 3822 California and were later able to contact Norbert Lenz, owner of the residence at 2705 South 15th. Mr. Lenz is in a realty type business. His profession being, owning and renting houses throughout the City of Omaha. We learned that Mr. Lenz had been in business during the occupancy of Mr. Gates at the residence in question with his brother Larry Lenz. They have since dissolved the partnership although Larry Lenz could offer valuable information concerning Mr. Gates.

In interviewing Norbert Lenz, 3822 California, we learned that GATES, Charles R. had lived at the residence 2705 South 15th Street for approximately one year prior to July 1976. We learned that GATES had left the residence moving out owing Mr. Lenz approximately $400.00 in back rent. [Page 5]

Mr. Lenz related that Gates did considerable damage to the interior of the house by leaving the water running in the bathroom and kitchen. This caused the floorboards and subflooring to warp. Under question Mr. Norbert Lenz related that he felt that Gates may have done this out of anger, because

he had complained to Larry Lenz about the toilet running constantly and making noise. Under questioning LENZ, Norbert stated that there was considerable mess to clean up upon finding that GATES had moved. He related that he had been inside the house on at least two occasions while GATES resided there. Norbert Lenz related that after GATES moved out during the cleanup operation, a large wad of chewing gum was found by his son. He related this wad of chewing gum had definitely been used and was approximately twice the size of a softball. He made several comments about Mr. Gates being sort of a strange person, then explained that he had found a contraption made from an old refrigerator (round top type). This contraption contained a window which, as described by Mr. Lenz, took a lot of work to install in the door of this old refrigerator. Opening the door he found a small child type chair mounted to the bottom of the refrigerator. The three interior walls of the refrigerator were covered with intricately installed light sockets containing various colored light bulbs which were operational through a chord out the back of the refrigerator. He also stated atop the refrigerator was mounted an old type coffee pot which had been screwed to the top of the refrigerator. Mr. LENZ, Norbert related that "it looked like some sort of an outer space gadget". Under questioning we learned that the Lenz Brothers, while in partnership, required their tennants to fill out a thirty-day rental agreement form which they provided. This form required three references. Mr. LENZ, Norbert related that he thought that upon the dissolving of the partnership with his brother that those records were kept by Mr. Larry Lenz (office phone 554-1616, residential phone 556-9005).

Officers Taylor and Larsen then proceeded to Mr. Larry Lenz's office directly behind that of Mr. Norbert Lenz and spoke with the Secretary who attempted to locate this thirty-day rental agreement. She related that Norbert Lenz would probably have kept that agreement but that he was an atrocious records keeper. We returned to Norbert Lenz's office [Page 6] and he related that he would attempt to locate this paper and also related his attorney's name as he may have given it to his attorney during any legal action considered against GATES for the back rent owed. Mr. LENZ, Norbert then remembered that his son had mentioned finding a box of expended .38 caliber cases in the basement of 2705 South 15th upon cleanup. Mr. Lenz related that all of these items including the refrigerator, chewing gum, .38 caliber cases would have been destroyed by transporting them to the City Dump.

Officers terminated interview with Norbert Lenz and interviews with Larry Lenz and his Secretary and proceeded to Omaha Police Headquarters where additional computer work was done on GATES, Charles R., learning nothing new.

ADDITIONAL FOLLOW-UP NEEDED

In addition to questioning the above mentioned Lenz Brothers officers should attempt to find any other rental agreements filled out by GATES, at 2705 South 15th, 5120 South 21st Street, Omaha; 4105 South 11th Street, Council Bluffs through Randy Schmidt of the Council Bluffs Police Department or through his current address at #22 Grandview, Council Bluffs and the landlord there for obtaining any references given by Gates, Charles R. so

that these people may be questioned in reference to his activities.

Completion of this follow-up in detail will necessitate other supplementary reports into his mental history through Douglas County Hospital, The Lincoln Nebraska Regional Center and any other mental institutions which may come up in the future.

This follow-up investigation will also proceed into his employment over the past several years and any references given by Gates on employment applications to those employers.

Report Typed By: Nancy Geise	Date: 8-12-77
Time: 1500 hrs.	Disposition of Case:
Approved By: /s/ _____	D. C. Larsen _____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 9:30 A.M.
Original Report by Officers: L. W. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): Schweer, John Lloyd
Address:	Address: 212 Millard
Date and time of this supplementary report: 7-25-77 1055 hrs.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

At 8:30 A.M. this date, while Officers Brown and Moore were with Lee Ault of the City Engineering Office plotting out the diagrams for this investigation, a Mr. J. H. (Jim) Burke of the Northwestern Bell Telephone Company approached us and related the following information.

Last Tuesday evening, July 19, 1977, at approximately 11:30 P.M., he and his son happened to be Northbound on South 11th Street in the area of the phone company. Mr. Burke at this time saw a man, average build, wearing bib overalls, running West along the cyclone fence on the South end of the

power company's lot. Then he went Northwest across South 11th Street under the yard light for the power company. Then he went due West along the South fence line for Best Refrigeration. This man also had a dog with him and Mr. Burke thought that it might have been an average size dog, possibly a hunting type. He felt it might have been a goldish color. That was the last he saw of him.

Mr. Burke advised that he thought the man was carrying a board, but then realized that it was a shotgun. Mr. Burke was stopped by another man in a red vehicle and was asked if he saw the man running. The man in the red vehicle then went in the direction where the man was running.

Officers went to the PAWS station and interviewed the employees there and according to two employees they have seen this man in the area before in the daytime but without the shotgun. They advised that they will watch for him and if they see anything matching this man's description they will call us. Officers then went and talked to an employee at the pumping station next to PAWS and advised them to be on the lookout for this unknown man.

Officers called Mr. Burke at his place of employment at 10:45 A.M. this date and asked him if the man in the red vehicle was driving a Toyota or a car. Mr. Burke advised that this was a red vehicle with no plates on it. He also advised that he saw a picture in the paper this morning and he did recognize John Schweer as the man he talked to that night.

J. H. (Jim) Burke, Installation Supervisor PBX & Repair Related, Northwestern Bell Telephone Company, 1101 - 31st Avenue, P.O. Box 219, Council

Bluffs, Iowa 51501, Phone (712) 328-4184. Home (712) 323-2657.

[EXHIBIT 4]

Report Typed By:	Date: 7-25-77
Time: 1055 hrs.	Disposition of Case:
Approved By: /s/	_____ L. W. Brown Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 0930 hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): SCHWEER, JOHN LLOYD
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 8-12-77 1310 hrs.	Evidence turned over to: Property Management, Ident, BCI

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

SYNOPSIS

The following will be the contents of an interview with Mrs. Janet Shoemaker an astrologist who has volunteered her services to aid in the investigation into this offense. This report will contain numerous statements made by Mrs. Shoemaker in relationship to several astrological charts performed by her through her expertise in this subject.

PERSONS AND PLACES MENTIONED IN THIS REPORT

Mr. David E. Richter, Pottawattamie County Attorney

Mr. Joseph Hervol, Assistant Pottawattamie County Attorney

Reporting Officer (D. C. Larsen)

Mrs. Howard Shoemaker (Janet)

[EXHIBIT 5]

DETAILS

Mrs. Howard Shoemaker volunteered her services through the Pottawattamie County Attorney's Office to use her expertise in the field of Astrology to assist in the investigation into the above offense. Mrs. Shoemaker came to the County Attorney's Office at 0930 hours, August 12, 1977 and Mr. Joseph Hervol, Assistant Pottawattamie County Attorney requested reporting Officer be present to assist in taking notes on her comments on this case.

Mrs. Shoemaker requested that the date of birth of the victim, SCHWEER, John Lloyd. That date of birth is 7-16-20. She stated that when she first heard about this matter she paid very little attention to the details of this crime. She said that upon hearing of the $5,000.00 reward her interest was gained and she sat down reading the newspaper accounts and making up different charts about the crime itself and its astrological ramifications. Mrs. Shoemaker stated that the crime occurred during the Jupiter Hour. She said someone was being fooled by money. She said the watchman was to meet someone who

may have requested some help. She went on to relate that she felt that the watchman [page 2] was a person who would try to help anyone, but wanted to make sure that he helped that person down the right path in life. She said that he was the type of person who wanted to make sure that he could distinguish between right and wrong and attempted always to take the right path. She said that there was a female companion involved. She was then questioned concerning whose female companion. She related that she could not tell but that only that there was a female involved. She went on to say that the female was good at financing. She was artistic to the point of profitability. She was questioned then about what type of artisticness was involved. She related that the person would be good as an interior decorator or as a fashion designer, but not a lowly person such as a prostitute. She said that the man responsible for the crime is an outgoing person, that he is a job jumper. That he may have been involved in institutional work. She said that he was agressive with ideas. Then commented that even though he could come up with ideas that he wasn't the type of person to follow them through to the end, he would leave them to someone else to finish. She then said that a person involved in this crime is unusually proportioned either physically or psychologically. She went on to inform us that there was a salesman or an agent or some type of go between involved in a monetary transaction. She said that the female, mentioned earlier, was used to lure the victim. She stated that the victim trusted someone he shouldn't have. The victim was fooled by someone. She related that she got three main words from all of her astrological charts with reference to the crime itself. Those three words were: MONEY, GREED, and GAIN. She re-

lated that there was a threat to someone or someone's home involved in the motive for this crime. Then she went on to say that there is something buried under ground or within the confines of figures, such as a [illegible] account or a checking account or stocks or bonds, but something is hidden or buried. She was questioned about this and related that this could possibly be the fact that the victim is now buried.

Mrs. Shoemaker was then given the date of birth 5-5-30. This being the date of birth of GATES, Charles Richard, our suspect in this matter. She took a few minutes and made a short astrological chart concerning his personality. She found that he was (1) super-sensitive, (2) is a self- [page 3] disciplined person, (3) a very active person, both mentally and physically, (4) was over-consumed with everything he came in contact with or he would reject it completely. That he may be very over-consumed with illegal sex. (5) His father was far to authoritative, (6) he has some sort of argument with authority, he may hate authority.

She went on to check another of her astrological charts saying that there was a windfall of money involved behind the motive or the actions leading to this crime. She said that the victim was going to help somebody. She said that there was some sort of a bondage concerning money or something that would fit the definition of the word bondage and that she would work it out and contact the Pottawattamie County Attorney's Office with another chart.

This concluded the interview with Mrs. Howard Shoemaker. She stated that she would work on some more charts of astrological nature and contact the

Pottawattamie County Attorney's Office with the results.

ADDITIONAL FOLLOW-UP NEEDED

These thoughts concerning the astrological charts made by Mrs. Howard Shoemaker should be compared with possible suspects, possible motives, and the numerous theories involved with this offense, then filed for future reference.

Report Typed By: Nancy Geise	Date: 8-13-77
Time: 1400 hrs	Disposition of Case:
Approved By: /s/_____	D. C. Larsen_____ _____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 0930
Original Report by Officers: L. W. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): Schweer, John Lloyd
Address:	Address: 212 Millard
Date and time of this supplementary report: 7-22-77 1820 hrs	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

Note turned over to Det. Brown by Sgt. Larry Williams at 10:52 A.M. at the scene:

12:30 A.M. 7-20-77

Dave:

If you get a chance, talk to Tim O'Niel at Datsun Mt. Ask him if he would install or put in flood lights in the car lot on the West side of his building, where he keeps his trucks parked. I chased a man out of there last night. It appeared that he was trying to get in to one of the trucks. When I approached him

he ran north West in to the weeds and I lost him. Lights would sure help in this area.

Schweer.

Note tagged and in evidence.

[EXHIBIT 6]

Report Typed By:	Date: 7-22-77
Time: 1820 hrs	Disposition of Case:
Approved By: _____	_____ L. W. Brown _____ Signature Reporting Officers

[EXHIBIT 6]

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 0930
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): John L. Schweer
Address:	Address: 212 Millard
Date and time of this supplementary report: 7-22-77 5:25 P.M.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

Officers Mitchell and Kremer were assigned to work with C.I.D. on above offense. Officers worked Sat. evening 7-23-77. Officers went to several taverns looking for contacts and people that we thought could help us in this investigation. Officers did make contact with numerous people and put the word out what we had to offer and what we wanted in return.

Officers worked Sunday 7-24-77 and again we tried to make more contacts towards the above offense. Officers did contact Kenneth Still in reguards to this offense. Ken was talked to about this and also he was offered money if he could come up with some-

thing later on. Ken stated he would try and he would be contacted later if anything came up.

Officers R.Moore and Kremer worked Monday 7-25-77 together. Officers assisted in the questioning of Charles Gates at the station and later we checked his residence to see if we could find out anything else about this person in reguards to this offense. After checking this residence, #22 Grandview Ave. officers made several other contacts this evening putting out information money.

Officers Mitchell and Kremer worked Tuesday 7-26-77. Some of the contacts started to make contact back to us. So far no new leads though. Officers again tried to contact Charles Browning again but he wouldn't talk to officers or he hid out for some other reason. (Charles Browning was talked to by officers Moore and Kremer on 7-25-77 10.00 P.M. At this time Chuck stated to officers that he went to the drive in Thursday night 7-21-77 and he returned home around 3:00 A.M. He stated that he went with the girl Peggy that he lives with. He stated that on Friday 7-22-77 he and Peggy went to Sioux City for a couple of days, returning Sunday night 7-24-77. charles was also offered information money and he stated he would contact officers later or officers could contact him. Charles stated that Peggy did have a 12 gauge shotgun and he uses it. Officers did leave charles at that time and are checking out his story.) Officers checked out the people that we had working for us and at this time there are no new leads. Officers Mitchell, L.Brown, Moore, and Kremer then worked the area where John Schweer was shot. Officers had a night scope and officers were atop the telephone building and checking the area for a man

with a dog. Officers did stay in that area until 4:00 A.M. with this night scope.

Officers feel that there contacts are out working and it will take time to get information back. Above report is left to cover some of the things done about above offense.

[EXHIBIT 7]

Report Typed By: Kremer	Date: 7-27-77
Time: 6:00 P.M.	Disposition of Case: open
Approved By: /s/ _____	B. J. Kremer _____ _____ Signature Reporting Officers

[EXHIBIT 7]

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: Homicide	Date and Time Reported: 7-22-77, 9;30 A.M.
Original Report by Officers: L.W. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): Schweer, John Lloyd
Address:	Address: 212 Millard, Co. Bluffs, Iowa
Date and time of this supplementary report: 7-23-77 0500 hours	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

Between the hours of 3 and 4 am, 7-21-77, officer Cady had occasion to speak to Mr. John Schweer, who at the time was working as a security guard at McIntyre Olds and Tim O'Neil Datsun. During this conversation, Mr. Schweer mentioned that he had observed a man in the area of Tim O'Neil Datsun and that he thought the man was carrying a rifle, but he could have been mistaken and that the object that the man was carrying could have been a car jack. Mr. Schweer had then lost sight of the man and he stated that he believed that the man was still in the area and that he was probably hiding in the

weeds located near the Datsun dealership. Schweer stated that a dog was still in the area and that he believed that this animal belonged to the man that he had seen. At the time of this conversation, I did not think too much of the incident related to me and Mr. Schweer did not seem too concerned. I am unable to recall and further details of the conversation at this time.

[EXHIBIT 8]

Report Typed By: Cady	Date: 7-23-77
Time: 0530	Disposition of Case:
Approved By: /s/_____	/s/_____ Signature Reporting Officers

SUPPLEMENTARY REPORT

Police Department
Council Bluffs, Iowa
Page #1 of 3

	Control No.: G77-2157 R. B. No.: Case No.:
Offense: G77-002-157-001	Date and Time Reported: 7-22-77 0732 Hrs.
Original Report by Officers: L. Brown	
Victim or Complainant (Business):	Victim or Complainant (Person): Schweer, John
Address:	Address: 212 Millard, Co. Bluffs, Ia.
Date and time of this supplementary report: 7-28-77 1700 Hrs.	Evidence turned over to:

DETAILS of Investigation: (Arrests, – Rec. Prop. – Additional Evidence, etc.)

[EXHIBIT 10]

Sgt. L.L. Diamond accompanied by Mr. Joe Hrvol of the Counties Atty's Office did make the following contacts while involved in the above investigation. The area covered was So. 13th Street from 26th Avenue to and including the 2900 block.

1225 26th Avenue, Mrs. Annabelle Wills – No Information

1230 26th Avenue, Mr. Messick – Referred to the Vurmule residence on So. 15th St. in approx. the 2700 block.

2613 So. 13th Street. Delores Marr – No Information

2620 So. 13th Street. Byron Jones – No Information

816 24th Avenue. Dennis Larsen – No Information

2612 So. 13th Street. Mrs. Michael Shea – Stated that she observed a male subject that fit the description of the suspect in question in the area from the So. Expressway to the levee and from 23rd Ave. to the Interstate and this subject was walking with dogs, one of which was a brownish color. She also feels that this subject boards his dogs at the Kirth Kennels on 23rd Ave. in the 600 block. She further states that she has observed this man wearing bib overhalls, some type of hat and as stated above, always in the company of dogs. (Officers note: This is a perfect description of Charles Gates, a previous suspect in the above case.)

625 So. 13th Street. Mrs. Daniel Akins – This ladies story concurs exactly with the information given to officer by the above Mrs. Shea. The only added information is that Mrs. Akins did observe the above subject as recently as Friday the 22nd of July in the area of the 600 block of 23rd Avenue and the Expressway and the CreekTop.

1200 Block of 27th Avenue. - Mr. Katerite – Relates partial information to concur with the above two ladies. [page 2]

(Cont.)

2701 So. 13th Street. – Alvin Gerdis – Mr. Gerdis states that he is employed at Mercy Hospital in the Power Plant. He relates that there is a young man that works in the laundry at the above hospital and lives in BO'S Trailer Court which is located in the 2800 block of So. 6th Street. Mr. Gerdis stated that this mans name is Fred (Last name unknown) and he is approx. 25 years old and does have a German Shorthair dog which he walks around with. (Note: Detective Car #521 was supposed to contact this Fred ???? if possible and converse with him.)

2727 So. 13th Street. Joe Benak – No Information.

2721 So. 13th Street. Lester Bingle – This man and his wife didn't seem to have any useful information, However it might be noted that this man does fit the general description of the wanted suspect very closely. It was also learned that this man does walk a brown dog in this area, however officer could not observe the dog anywhere to see if it fit the description of the listed suspect dog and when questions were asked about the dog, the above only stated that his was a little dog. This man did appear to be in his early 60's but did manage himself very well for his age.

2716 So. 13th Street. Lyle Hinkle – This gentleman stated that he had seen a 15 or 16 year old boy with a brown dog going up and down the levee in the A.M. hours around the above area.

2712 So. 13th Street. Robert Hopkins – No Information.

2704 So. 13th Street. Mrs. Hardyman – No Information.

2705 So. 13th Street. Mr.&Mrs. Gerald Sweeney – According to these people, they had seen a subject fitting the description of the suspect in the area with a brown sheperd looking dog. It seems that this man come from north of 27th Avenue and watched a house being built next door to the above people and then would return again to the north to an unknown location.

_1_ 28th Avenue. Merle Brown – Burt Thomas – According to these two gentleman, they have observed a young man jogging in the above area (Cont.) [page 3] (Cont.) and while observing this young man, they also observed that he was running with a large brown dog. This subject appeared to be approx. 25 years of age and has been seen numerous times in the above vicinity jogging with this dog.

2700 block of So. 15th Street – Buster Vermule – While conversing with this subject, his granddaughter did relate that she had seen a man with a large brown dog in the area of So. 15th Street and 23rd Avenue just prior to the ending of the school year.

Officers Note: It might be noted that while speaking with the Vermule family this date, Mrs. Vermule stated that her son had been by the Zaiger residence sometime ago and after coming home did relate to his mother that he had never seen so many C.B. Radio's as he had just seen at the Zaigers on So. 15th Street. The point of leaving this information is that the Zaigers are very capable of harming someone, and the idea of doing so in order to commit larceny does not fall beyond them. This name should not be over-looked in the Schweer shooting investigation.

[EXHIBIT 10]

Report Typed By: Sgt. L.L. Diamond	Date: 7-28-77
Time: 1830 Hrs.	Disposition of Case: Open
Approved By: /s/	Sgt. L.L. Diamond & Mr. Joe Hrvol (Co. Atty's Office) Signature Reporting Officers

STATE OF IOWA, POTTAWATTAMIE COUNTY,
IN THE DISTRICT COURT OF IOWA
POTTAWATTAMIE COUNTY

PRELIMINARY INFORMATION

STATE OF IOWA	)	
	)	
vs.	)	SS.
	)	
Curtis McGhee	)	

The above named defendant is hereby accused of the crime of MURDER.

For that the defendant, on or about the 22nd day of July, 1977 in Pottawattamie County, Iowa, did murder John Schweer, contrary to the statue in such cases made and provided by Section 690.1, 1977 Code of Iowa

Wherefore he prays that the said defendant Curtis McGhee may be arrested and dealt with according to law.

Lyle W. Brown

Subscribed and sworn to by the said Lyle W. Brown before me, this 17 day of November, 1977.

/s/
Magistrate

**IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF IOWA, CENTRAL DIVISION**

TERRY HARRINGTON, individually and in his capacity as the father of NICOLE ANTOINETTE HARRINGTON, Plaintiff,	)	Civil Nos. 4-05-CV-00178-RP-TJS 05-CV-00255 03-CV-90616
vs.	)	
COUNTY OF POTTAWATTAMIE, IOWA, CITY OF COUNCIL BLUFFS, IOWA, DAVID RICHTER, in his individual and official capacities, JOSEPH HRVOL, in his individual and official capacities, DANIEL C. LARSEN, in his individual and official capacities, LYLE W. BROWN, in his individual and official capacities, and JOHN DOES ONE THROUGH NINE, in their individual and official capacities, Defendants.	)	**PLAINTIFF TERRY HARRINGTON'S STATEMENT OF ADDITIONAL MATERIAL FACTS THAT PRECLUDE SUMMARY JUDGMENT**

Comes now Plaintiff Terry Harrington ("Harrington"), by and through counsel, and pursuant to Federal Rules of Civil Procedure Rule 56 and Local Rule 56.1(b)(3) submits his Statement of Additional Material Facts that Preclude Summary Judgment and that defeat Defendants' Motion for Partial Judgment on the Pleadings1 (despite Defendants' failures to meet their requisite burdens for such motions) as follows:

1. Defendants Brown and Larsen were detectives with the Council Bluffs Police Department at the time of the Schweer murder and worked as the lead investigators working on the case from July 22, 1977 through the criminal trails of Harrington and McGhee in 1978. (PCR 2000 Tr. (Brown Test.) at 64-65, Pl.'s App. at 247-248; Compl. ¶¶ 11, 12).

2. Defendants (then) County Attorney Richter and Assistant County Attorney Hrvol worked closely with Brown, Larsen, and the rest of the Council Bluffs Police Department during the Schweer murder investigation, including participating in witness interviews before any arrests were made. (Hrvol Dep. 1987 at 5-7, Pl.'s App. at 159-161; Gershman Aff. ¶¶ 11, 14, Pl.'s App. at 328-333; Compl. ¶¶ 9, 10).

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1 Council Bluffs and Defendants Larsen and Brown have relied in part upon the summary judgment motions filed by Pottawattamie County and Defendants Hrvol and Richter. As such, Plaintiff hereby submits the following facts as necessary to address those issues that this Court may convert to a summary judgment analysis. All claims not converted shall be responded to with the pleadings, which Defendants admit are taken as true for the purposes of analyzing a motion for judgment on the pleadings under Federal Rules of Civil Procedure Rule 12(c).

3. Neither the Pottawattamie County Attorney's Office, through its chief law enforcement officer County Attorney Richter, nor the City of Pottawattamie Police Department trained regarding constitutional rights established by *Brady v. Maryland* and *Giglio v. United States*. (Richter Dep. 2006 at 6, 96, Pl.'s App. at 335, 336; Hrvol Dep. 2006 at 219-224, Pl.'s App. at 339-340; Gershman Aff. ¶¶ 10, 15, 17, Pl.'s App. at 328-333; Nault Aff. ¶¶ 4-20, Pl.'s App. at 323-327; *see also* Wilber Dep. at 8, 31, Pl.'s App. at 314, 315).

4. In 1977, Defendant Hrvol worked closely with police officers Larsen and Brown over the weeks leading up to the arrests of Plaintiffs Terry Harrington and Curtis McGhee. (Hrvol Dep. 1987 at 5:4 – 6:5, Pl.'s App. at 159-160; Larsen Dep. 1987 at 8:16 – 8:22, Pl.'s App. at 180; PCR 2000 Tr. (Hrvol Test.) at 295:25 – 296:11, Pl.'s App. at 274-275; Gershman Aff. ¶ 12, Pl.'s App. at 330-331; Compl. ¶¶ 24, 26).

5. Hrvol helped do a lot of "stuff" because the police field investigators needed help with the investigation and put a lot of man-hours into the investigation. (Hrvol Dep. 2000 at 17:4 - 17:14, Pl.'s App. at 241; Trial Tr. at 1033, Pl.'s App. at 157).

6. Hrvol canvassed the neighborhood near the scene of the murder with Officer Diamond. (Police Rep. dated July 28, 1977, Pl.'s App. at 036-038; Compl. ¶ 46).

7. At that time, Hrvol was not assigned the responsibility of prosecuting the case—he was assisting the police in the investigation: "The only

one in the office intensely involved in the investigation was me." (Hrvol Dep. 1987 at 5:4 - 6:5, Pl.'s App. at 159-160; PCR 1988 Tr. (Hrvol Test.) at 47:23 – 47:25, 67:24 – 67:25, Pl.'s App. at 220, 229).

8. The early stages of the investigation involved more than a dozen suspects, none of whom included Harrington or McGhee. (PCR 2000 Tr. (Brown Test.) at 69, Pl.'s App. at 252; Richter Dep. 1987 at 39:19 – 40:5, Pl.'s App. at 169-170; Trial Tr. 83, 98-102, 104-110, 134, 492-493, Pl.'s App. at 096, 098-102, 103-109, 133, 144-145; Withheld Police Reps., Pl.'s App. at 021-038).

9. While working on the investigation of the case, and before Harrington was a suspect, Hrvol knew Charles Gates was a suspect in the Schweer murder. (PCR 2000 Tr. (Brown Test.) at 75:18 – 76:17, Pl.'s App. at 255-256; Hrvol Dep. 2000 at 9:3 – 9:21, Pl.'s App. at 240; Hrvol Dep. 2006 at 94:5 – 94:22, Pl.'s App. at 338).

10. Hrvol assisted in answering McGhee's discovery2, which disavowed any other suspects in the case other than McGhee (including even Harrington). (Def's Answer McGhee Interrog. No. 2, Pl.'s App. at 190; Compl. ¶ 213).

11. Hrvol assisted in answering McGhee's 1987 first post-conviction hearing discovery, which asked information about "witnesses used at trial who

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2 Plaintiff references discovery from McGhee's case and post-conviction review because after due diligence, none of Plaintiff's previous or current attorneys could locate copies of Harrington's early discovery.

were promised leniency in exchange for their testimony against Curtis McGhee, and the specific promises made to each" but answered: "None." (Def's Answer McGhee Interrog. No. 6, Pl.'s App. at 192; Compl. ¶ 246).

12. Hrvol assisted in answering McGhee's 1987 first post-conviction hearing discovery, which as a result of the report of a man and a dog seen in the vicinity of the murder scene, that the "man and a dog" (Gates) was "never found or identified." (Def's Answer McGhee Interrog. No. 14, Pl.'s App. at 195; Compl. ¶ 214).

13. Hrvol was present with the police investigators a number of times when Hughes was interviewed, both in Omaha and Council Bluffs, before charges were filed against Harrington. (Trial Tr. at 71-73, 112-113 Pl.'s App. at 093-095, 111-112; Hrvol Dep. 1987 at 6:6 – 6:15, 21:6 – 21:12, Pl.'s App. at 160, 165; PCR 1988 Tr. (Brown Test.) at 14-15, Pl.'s App. at 213-214).

14. The investigation was particularly long lasting, and as such, Hrvol was sure prosecutors got copies of the police reports. (Hrvol Dep. 2000 at 9, Pl.'s App. at 240).

15. Hrvol, Brown, and Larsen went to Omaha to interview Hughes. (Larsen Dep. 1987 at 8:16 – 8:22, Pl.'s App. at 180; Oct. 15, 1977 Omaha Police Rep., Pl.'s App. at 062-065).

16. Richter oversaw the prosecutor office's participation in the investigation of the Schweer murder, and Hrvol kept him advised. (Richter Dep.

1987 at 12:4 – 12:9, Pl.'s App. at 167; PCR 1988 Tr. (Hrvol Test.) at 67:25 – 68:4, Pl.'s App. at 229-230).

17. His office participated to a significant extent in the investigation and would have received regular reports and would have generally monitored what was going on. (Richter Dep. 2006 at 93-96, Pl.'s App. at 336).

18. Richter interviewed a witness closely after the murder, David Waide, who positively identified Gates as the man he had seen walking dogs in the vicinity of the murder based on a photograph he was shown by police and Richter. (Withheld Police Rep. dated July 28, 1977, Pl.'s App. at 022; Compl. ¶¶ 44, 204).

19. Richter and Hrvol, on August 12, 1977, in conjunction with the police, and before Harrington was a suspect, consulted an astrologer early in the investigation and gave her Gates' date of birth so she could prepare astrological charts for him. (Withheld Police Rep. dated Aug. 13, 1977, Pl.'s App. at 030-031; Compl. ¶¶ 55, 206).

20. Hrvol was not only aware of every occasion the police talked to Kevin Hughes, but Hrvol was actually with the police on practically every occasion. (Larsen Dep. 1987 at 10:7 – 10:16, Pl.'s App. at 182).

21. Larsen caught Hughes in several lies, so Hughes was told that he had "better cough up the truth because it wasn't going to look good for Hughes if he didn't." (*Id.* at 15:4 – 15:6, Pl.'s App. at 183).

22. One investigative tool included telling a "smaller fish" that he would be the "trigger man" unless he yielded up bigger fish. (*Id.* at 15:7 – 15:13, Pl.'s App. at 183).

23. Once that threat was made to Hughes, he became much more cooperative. (*Id.* at 15:24-25, 16:1, Pl.'s App. at 183-184).

24. Neither the fact that Hughes had been threatened, nor the fact that he was testifying in return for criminal charges being dropped, was ever provided to Harrington or his lawyers prior to Harrington's conviction (or to McGhee's lawyers). (PCR 1988 Tr. (Richter Test.) at 30-31, Pl.'s App. at 216-217; (Hrvol Test.) at 51, Pl.'s App. at 222; Compl. ¶ 248).

25. There were no suspects as hot as Gates, known as the man with the dog, the first four or five days following the murder. (PCR 2000 Tr. (Brown Test.) at 66:1 – 69:24, Pl.'s App. at 249-252; Nault Aff. ¶¶ 21, 22, Pl.'s App. at 323-327; Compl. ¶ 40).

26. During the first week after the murder there were a number of suspects. (PCR 2000 Tr. (Brown Test.) at 67:8 – 67:9, Pl.'s App. at 250).

27. Brown knew as the lead investigator that early on, witness Burke saw a person with a dog and a shotgun around the time of the murder, whom he assumed to be Gates. (*Id.* at 66:10 – 67:3; Pl.'s App. at 249-250; Withheld Police Rep. dated July 28, 1977, Pl.'s App. at 21; Compl. ¶¶ 35, 36; Nault Aff. ¶ 21, 23, Pl.'s App. at 323-327; Burke Aff. 2002, Pl.'s

App. at 279-280; Burke Interview 2003, Pl.'s App. at 289-295).

28. Brown knew that Schweer left a note about chasing someone off that had a gun. He assumed that the person Schweer was writing about before his death was Gates. (PCR 2000 Tr. (Brown Test.) at 73:5 – 73:12, Pl.'s App. at 253; Withheld Police Rep. dated July 23, 1977, Pl.'s App. at 35; Nault Aff. ¶¶ 22, 23, Pl.'s App. at 323-327; Compl. ¶ 29).

29. Brown testified at Harrington's 1978 trial and 1988 post-conviction review proceedings that there were no early-on alternate suspects and he failed to indicate that Gates was ever a suspect, but in Harrington's 2000 post-conviction review proceedings testified that Gates was a suspect within a couple of days of the murder. (PCR 2000 Tr. (Brown Test.) at 65:17 – 66:15, Pl.'s App. at 248-249; Compl. ¶ 211; Nault Aff. ¶ 23, Pl.'s App. at 323-327).

30. Council Bluffs police officer, Larry Williams testified that Hrvol and Richter worked side by side on the investigation and that all police reports, including polygraphs were provided to the Pottawattamie County Attorney's office. (PCR 2000 Tr. (Williams Test.) at 30:7 – 30:12, 63:16 – 64:2, Pl.'s App. at 244, 246-247).

31. Hrvol and Richter worked side by side with Williams on the Schweer murder investigation. (PCR 2000 Tr. (Williams Test.) at 59:7 – 59:12, Pl.'s App. at 244, 245; Williams Dep. 2005 at 48:20 – 49:1, Pl.'s App. at 317-318).

32. Richter, along with Williams, reinterviewed witness Burke after Brown had interviewed him. (Withheld Police Rep. dated July 28, 1977, Pl.'s App. at 021; Compl. ¶ 37; Nault Aff. ¶ 23, Pl.'s App. at 323-327).

33. Police procedure required that all police reports from the Schweer homicide investigation were given to the county attorney's office, but eight reports never made it to Harrington's (or McGhee's) defense counsel or post-conviction review counsel. (PCR 2000 Tr. (Williams Test.) at 63:16 – 64:2, (Brown Test.) at 75:14 – 75:21; (Cleary Test) at 203:22 – 204:24, 215:11 – 215:20, Pl.'s App. at 246-247, 255, 257-259; Compl. ¶¶ 279-281).

34. The procedure also required that all polygraph results accompany those investigative reports. (PCR 2000 Tr. (Williams Test.) 63:16 – 64:2, Pl.'s App. at 246-247).

35. Richter and Hrvol, and the police, were aware that—before implicating Harrington as Schweer's murderer—Hughes had incorrectly implicated other people, including Anthony Houston, Arnold Kelley, and Steven Frasier, one-by-one, as being responsible for Schweer's murder. (Richter Dep. 1987 at 39:19 – 40:5, Pl.'s App. at 169-170; Trial Tr. 43, 83, 98-99, 134, 97-98, 100-102, 104-110, 492-493 (Hughes Test.), Pl.'s App. at 92, 96, 98-99, 133, 97-98, 100-102, 103-109, 144-145).

36. Richter stated that he could not muster the probable cause to issue an arrest warrant for Hughes for Schweer's murder, and Hrvol opined that Hughes was not an accessory or principal to the

murder. (Richter 1987 Dep. at 38:13 – 39:6, 40:14 – 40:16, Pl.'s App. at 168-169, 170; PRC 1988 Tr. (Hrvol Test.) at 64-65, Pl.'s App. at 247-248).

37. Hughes initially lied about Anthony Houston committing the murder while Hrvol was present and before Harrington was a suspect. (Trial Tr. 97-102, Pl.'s App. at 97-102; Compl. ¶ 96).

38. Larsen knew that Hughes had falsely implicated Houston and Dennis Jackson before implicating Harrington. (Larsen Dep. 1987 at 9:4 – 9:24, Pl.'s App. at 181; Trial Tr. at 104-109, Pl.'s App. at 103-108).

39. Hughes lied under oath at Harrington's trial that he was with McGhee and Harrington at the car dealership the night of the murder. (PCR 2000 Tr. (Hughes Test.) at 251:3 - 251:11, Pl.'s App. at 260).

40. Hughes lied that he had seen Harrington with a shotgun. (*Id.* at 254:8 – 254:18, Pl.'s App. at 261; Trial Tr. at 127-130, Pl.'s App. at 126-129).

41. Hughes had no personal knowledge regarding Schweer's death—the only knowledge he received came from police and prosecutors. (Hughes Aff. at ¶¶ 2 & 13, Pl.'s App. at 308-309).

42. Hughes met with police and prosecutors on four or five occasions and was taken to the scene of the crime, and the police and prosecutors provided him with the details of his testimony so he could keep his story straight. (Trial Tr. at 115-137, Pl.'s App. at 114-136; PCR 2000 Tr. (Hughes Test.) at 251,

Pl.'s App. at 260; Hughes Dep. 2003 at 7, Pl.'s App. at 311; Compl. ¶¶ 135, 136).

43. The day before Hughes gave his November 16, 1977 statement that implicated Harrington in Schweer's murder, Hughes went to the murder scene with representatives of the County Attorney's office. (Trial Tr. at 138, Pl.'s App. at 137; Compl. ¶ 134).

44. In return for his false testimony, Hughes was told he might receive the $5,000.00 reward; Hughes was offered this money by Hrvol. (PCR 2000 Tr. (Hughes Test.) at 251:3 – 251:15, 256:20 – 257:21, Pl.'s App. at 260, 263-264; Hughes Aff. 2003 at ¶ 3, Pl.'s App. at 308; Compl. ¶¶ 78, 80).

45. In return for his false testimony, Hughes was told that he was not going to be charged for the murder. (PCR 1988 Tr. (Hrvol Test.) at 74:16 – 75:21, Pl.'s App. at 232-233).

46. Hughes testified that he lied because he did not want to be part of a murder "rap" and police and prosecutors threatened with murder charges. (Trial Tr. at 115, Pl.'s App. at 114; PCR 2000 Tr. (Hughes Test.) at 251, 256-257, Pl.'s App. 263-264; Hughes Aff. 2003 at ¶ 3, Pl.'s App. at 308).

47. The State failed to disclose the 1978 charge filed against Hughes for conspiracy to commit auto theft—the attempted auto theft in which the State claimed Harrington shot Schweer. (PCR 1988 Tr. (Richter Test.) at 30, 46, Pl.'s App. at 216, 219; Compl. ¶ 248).

48. Hughes was first charged on June 9, 1978, as an adult for both escape from the Christian Home and conspiracy with McGhee and/or Harrington. (Richter Dep. 1987 at 19:1 – 19:21, Pl.'s App. at 172; PCR 1988 Tr. (Brown Test.) at 11:21 – 13:21, Pl.'s App. at 210-212; Compl. ¶ 249).

49. Brown and/or Hrvol filed the preliminary information and oath charging Hughes with escape and conspiracy to commit auto theft with the Clerk of the District Court on July 7, 1978. (Richter Dep. 1987 at 18-19, Pl.'s App. at 171-172; Hrvol Dep. 1987 at 11:2 – 11:18, Pl.'s App. at 163; Compl. ¶ 250; PCR 1988 Tr. (Brown Test.) at 11-13, Pl.'s App. at 210-212).

50. Hrvol instead filed a Juvenile Petition for Hughes, Number 11-0196, with the Clerk of the District Court on July 17, 1978 in order to change the adult conspiracy to commit auto theft to a juvenile charge, which Richter was aware of. (Richter Dep. 1987 at 20:15 – 21:18, Pl.'s App. at 173-174; Compl. ¶ 251).

51. Hrvol moved to dismiss the juvenile conspiracy to commit auto theft petition against Hughes, which the Clerk of the District Court filed on November 6, 1978. (PCR 1988 Tr. (Hrvol Test.) at 55:2 – 55:8, Pl.'s App. at 224; Compl. ¶ 252).

52. As a policy, Richter had some review over determinations to charge nonroutine juvenile cases. (Richter Dep. 1987 at 21:14 – 21:21, Pl.'s App. at 174; Compl. ¶ 253).

53. Richter did not dispute that the record reflected that he interviewed Hughes regarding the Schweer murder. (Richter Dep. 1987 at 12:7 - 12:22, Pl.'s App. at 167; Hughes Nov. 16, 1977 Statement, Pl.'s App. at 66).

54. Richter and Hrvol never disclosed the deals that they made with Hughes. (PCR 1988 Tr. (Brown Test.) at 14; (Richter Test.) at 30-31, 46; (Hrvol Test.) at 51, Pl.'s App. at 213, 216-217, 219, 222; Compl. ¶¶ 248-254).

55. On November 16, 1977, an information charging Harrington with first-degree murder for Schweer's death and Richter and Hrvol approved the decision to arrest Harrington. (True Information, Cause No. 17892, Pl.'s App. at 39-61; Compl. ¶ 195).

56. Richter and Hrvol talked to Hughes before Hughes's statement and 1978 trial testimony and told Hughes that Harrington claimed he was at Peony Park at a concert at the time of the murder and that Harrington could not have been with Hughes at 11:00 o'clock and that time is a factor in this case. (Trial Tr. at 117-118, 152, Pl.'s App. at 116-117; Compl. ¶ 137).

57. Hughes testified that he decided to expose his earlier lies because "[i]t's just been on my mind. I just want to get the truth out." (PCR 2000 Tr. (Hughes Test.) at 254:22 – 254:25, Pl.'s App. at 261).

58. Harrington's alibi witnesses that in 1978 corroborated Hughes' story have recanted their testimony. (Jacobs Aff., Pl.'s App. at 296-305; Pride

Aff., Pl.'s App. at 306-307; Jones Aff., Pl.'s App. at 281-282).

59. Clyde Jacobs' trial testimony was false; he did not see Harrington or Hughes on the night of Schweer's murder, and he never saw Harrington with a shotgun in his car. (PCR 2000 Tr. (Jacobs Test.) at 272, 276:2 -276:6; Pl.'s App. at 265, 269).

60. At the time of Harrington's trial, Jacobs was forced to testify falsely by the prosecutors and police. (*Id.* at 272:15 – 273:25, Pl.'s App. at 265-266).

61. Hrvol accompanied the police on trips to Omaha and Council Bluffs to investigate, including trips with Larsen and Brown to take Jacobs from Omaha to Council Bluffs for questioning along with Jones and Pride. (Hrvol Dep. 1987 at 21:6 – 21:12, Pl.'s App. at 165; Compl. ¶¶ 156, 163).

62. The police originally detained Jacobs and Roderick Jones. Over time, the police gave them the details of the murder. (PCR 2000 Tr. (Jacobs Test.) at 273-274, Pl.'s App. at 266-267).

63. The police told Jacobs and Jones that if they did not testify against Harrington and McGhee, they would be charged with the same charges, plus the stolen cars charges. (PCR 2000 Tr. (Jacobs Test.) at 273-274, Pl.'s App. at 266-267).

64. The police also detained Hughes' girlfriend, Candace Pride. The police pressure caused Pride to break down where she nearly fainted. All of the Omaha teenagers, Jacobs, Jones and Pride were told that if they did not testify as the police were tell-

ing them to, they would all go to jail. (*Id.* at 274:2 – 274:21, Pl.'s App. at 267).

65. The three teenagers were contacted several times a week for about one month during the investigation of the case. (*Id.* at 279:18 – 282:7, Pl.'s App. at 270-273).

66. Hrvol, Brown, and Larsen confronted Harrington's alibi witness Thea Scott and accused her of lying, informed her incorrectly about the results of her polygraph examination, and Hrvol threatened her. (Trial Tr. at 143-144, 606-615, Pl.'s App. at 142-143, 146-155; Compl. ¶¶ 143, 144).

67. Hrvol told State witness Pierce to lie about McGhee's confession, and arranged, in conjunction with Larsen, for Pierce to be placed in a cell next to McGhee to effectuate this. (Pierce 1988 Test. at 16-27, Pl.'s App. at 197-208; Compl. ¶ 227).

68. McGhee never admitted to the murder while in prison. (Pierce 1988 Test. at 23:14 – 24:1, Pl.'s App. at 204-205; Reese Aff., Pl.'s App. at 090).

69. Hrvol told Pierce that if he obtained information from McGhee, things would go better for Pierce regarding his criminal charges. (Pierce 1988 Test. at 23:14 – 24:1, Pl.'s App. at 204-205).

70. Hrvol said in return for testimony, Pierce's criminal charges would be dismissed. (*Id.* at 20:1 – 20:5, Pl.'s App. at 201).

71. Hrvol met with Pierce several times in the designated client-lawyer room in the jailhouse without the presence of Pierce's lawyer and told

Pierce what to say. (*Id.* at 25:16-26:3, Pl.'s App. at 206).

72. After testifying for the state, the auto theft charges were dropped. (*Id.* at 24:10 – 24:20, Pl.'s App. at 205).

73. All of Pierce's trial statements were false. (*Id.* at 24:10 – 24:20, Pl.'s App. at 205).

74. In 1988, Pierce testified under oath and subject to penalty of perjury that police and prosecutors suggested some of the things that he should say in his 1978 McGhee trial testimony and that he lied in exchange for the promises of leniency. (*Id.* at 16-27, Pl.'s App. at 197-208; Compl. ¶¶ 228, 232).

75. Larsen described how he would go to North Omaha with other detectives in unmarked cars and single out "ghetto dwellers" and say, "'Bro, come here. Did you get the information I wanted,' and just kind of have some fun with them." (Larsen Dep. 1987 at 19:18 – 21:3, Pl.'s App. at 185-187).

76. Withheld evidence of a 911 tape in another case was found in Hrvol's desk after he had left the County Attorney's Office. (PCR 2000 Tr. (Hrvol Test.) at 297:23 – 299:10, Pl.'s App. at 276-278).

77. Plaintiff hereby incorporates all findings of fact made by the Iowa Supreme Court in its decision, *Harringon v. State*, 659 N.W.2d 509 (Iowa 2003), which vacated his conviction. (Pl.'s App. at 003-020).

Respectfully Submitted this 27th day of October, 2006.

/s/

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PLAINTIFF

[Certificate omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

TERRY HARRINGTON, Plaintiff, vs. POTTAWATTAMIE COUNTY, IOWA; THE CITY OF COUNCIL BLUFFS, IOWA; JOSEPH HRVOL; DAVID RICHTER; MATTHEW WILBER; DANIEL LARSEN; LYLE BROWN; and DAVID DAWSON, Defendants.	)	No. 05-CV-00178
TERRY J. HARRINGTON, Plaintiff, vs. MATTHEW D. WILBER and POTTAWATTAMIE COUNTY, IOWA, Defendants.	)	No. 05-CV-90616 **REPLY TO HARRINGTON'S STATEMENT OF ADDITIONAL FACTS BY POTTAWATTAMIE COUNTY, AND PROSECUTORS HRVOL, RICHTER, AND WILBER**

CURTIS W. MCGHEE, JR., Plaintiff,	)	No. 05-CV-00255
vs.	)	
POTTAWATTAMIE COUNTY, IOWA; THE CITY OF COUNCIL BLUFFS, IOWA; JOSEPH HRVOL; DAVID RICHTER; MATTHEW WILBER; DANIEL LARSEN; LYLE BROWN; and DAVID DAWSON, Defendants.	)	

COME NOW, Defendants, Joseph Hrvol, David Richter, Matthew Wilber, and Pottawattamie County; and, pursuant to Federal Rule of Civil Procedure 56, Local Rule 56.1(d), and the Court's July 27, 2005, Order Consolidating these matters for pre-trial purposes, submit their Reply to Harrington's Statement of Additional Facts.

1. Admit paragraphs 1 through 2.

3. Admit, but to qualify the assertion in that County Attorneys as attorneys in the State of Iowa are required to complete minimum legal education credits. The Attorney General's Office has the duty to provide such continuing legal education for County Attorneys according to Iowa Code Section 13.2.

4. Admit paragraphs 4 through 32.

33. Admit with qualification. According to the affidavit of Chad Primmer, the criminal file contained two of the purported missing reports. (See Primmer Affidavit and Supplemental Affidavit, Defendants' App. pp. 17-20).

34. Admit paragraphs 34 through 76.

77. Admit with qualification. Defendants admit plaintiff incorporates the findings of fact made by the Iowa Supreme Court but finds that an assertion requiring no response and objects to the incorporation by reference.

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[Certificate omitted in printing.]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

CURTIS W. MCGHEE, JR.,	*	
	*	4:05-cv-00255
Plaintiff,	*	
	*	
v.	*	
	*	
POTTAWATTAMIE COUNTY, IOWA; THE CITY OF COUNCIL BLUFFS, IOWA; JOSEPH HRVOL; DAVID RICHTER; MATTHEW WILBER; DANIEL LARSEN; LYLE BROWN; and DAVID DAWSON,	*	
	*	ORDER
Defendants.	*	
	*	
	*	
TERRY HARRINGTON, individually and in his capacity as the father of NICOLE ANTOINETTE HARRINGTON,	*	
	*	4:05-cv-00178
Plaintiff,	*	
	*	
v.	*	
	*	
COUNTY OF POTTAWATTAMIE, IOWA; CITY OF COUNCIL BLUFFS, IOWA; DAVID RICHTER, in his in-	*	

dividual and official capacities; JOSEPH HRVOL, in his individual and official capacities; DANIEL C. LARSEN, in his individual and official capacities; LYLE W. BROWN, in his individual and official capacities; and JOHN DOES ONE THROUGH NINE, in their individual and official capacities,	*	
	*	ORDER
Defendants.	*	

Before the Court are numerous pretrial motions filed by the parties. Each pending motion has been resisted by the opposing party, and the matters are fully submitted. The Court will address each motion in turn.

I. HARRINGTON'S RULE 104 MOTION FOR JUDICIAL ADMISSION OF FACT (HARRINGTON CLERK'S NO. 123) AND MCGHEE'S MOTION TO JOIN HARRINGTON'S MOTION (MCGHEE CLERK'S NO. 146)

The first motion pending before the Court is Harrington's Rule 104 Motion for Judicial Admission of Fact. Defendants filed a resistance to the motion on January 30, 2007. McGhee has requested to join in Harrington's Motion. No resistance was filed to McGhee's joinder request, and that motion (McGhee Clerk's No. 146) is, accordingly, granted. Plaintiffs argue that all facts admitted by Defendants with respect to the Defendants' various Motions for Judgment (including Motions for

Summary Judgment) should be considered judicial admissions at trial, such that further proof of those facts by Plaintiffs at trial will not be necessary. Specifically, Plaintiffs argue that Defendants Pottawattamie County, Richter, and Hrvol admitted all facts contained in Harrington's Statement of Additional Facts Precluding Summary Judgment (Harrington Clerk's No. 105.2); and Defendants City of Council Bluffs, Larsen, and Brown admitted those same facts by incorporating Pottawattamie County, Richter, and Hrvol's summary judgment pleadings by reference in their Motion for Judgment on the Pleadings and by failing to specifically deny the additional facts in their own pleadings. Defendants counter that the "admitted facts" were admitted only for purposes of the pending motions and cannot be deemed judicial admissions at trial.

In support of their contention that the referenced facts should be deemed judicial admissions, Plaintiffs cite this Court's ruling in *Americans United for Separation of Church and State v. Prison Fellowship Ministries,* 395 F. Supp. 2d 805, 809 (S.D. Iowa 2005). There, this Court found that a joint statement of stipulated facts submitted by the parties constituted a judicial admission for purposes of trial. *See Americans United,* 395 F. Supp. 2d at 809 (citing *State Farm Mut. Auto. Ins. Co. v. Worthington,* 405 F.2d 683, 686 (8th Cir.1968) ("The purpose of a judicial admission is that it acts as a substitute for evidence in that it does away with the need for evidence in regard to the subject matter of the judicial admission.")). In regards to admissions made in the context of summary judgment motions, the Court stated:

> Admissions made by a party, by formal

> means, in an adversarial process closely (in this case, meticulously) scrutinized by experienced attorneys, should not be lightly discarded on the grounds such admissions were made for the purposes of summary judgment. *See Frymire v. Peat, Marwick, Mitchell & Co.*, 1991 WL 66381 (N.D. Ill. April 22, 1991) (concluding, in an unreported case, that when a party placed itself in the position of asserting at the motion for summary judgment that certain facts exist without genuine dispute, that party is being disingenuous when it tried to argue such assertions could not be admitted at trial). If not made as a mere concession for the sake of argument, such statements are, after all, supposed to be the truth. If not, judicial proceedings at any stage are meaningless.

Id. Plaintiffs argue that Defendants here did not qualify their admissions with regard to Harrington's Statement of Additional Material Facts, and further argue that the reason for admission of those facts is particularly compelling in this case because of the procedural history of this case, i.e., because the Iowa Supreme Court made findings regarding Harrington's case based on an extensive record.

The Court recognizes that Defendants did not make a specific statement in its response to Harrington's Statement of Additional Material Facts that they were admitting those statements for purposes of summary judgment only. *See* Harrington Clerk's No. 112. Pottawattamie County, Hrvol,

and Richter did state, however, in their Brief in Support of Summary Judgment: "Assuming, *arguendo*, for purposes of summary judgment that the Plaintiff's factual allegations are undisputed, their claims against the Prosecutors and County fail as a matter of law because the Prosecutors are entitled to absolute, qualified, and sovereign immunity, and qualified privilege." *See* Harrington Clerk's No. 94.2 at 8. Additionally, in their Reply to Plaintiffs' Resistance to Motion for Summary Judgment, the Defendants again stated: "As Defendants have stated repeatedly throughout their Brief, the factual assertions made by Plaintiffs are assumed as they are stated for purposes of summary judgment." *See* Harrington Clerk's No. 115. Indeed, it was quite clear from Defendants' pleadings that their position on summary judgment was that, even assuming all of Plaintiffs' alleged facts as true, Defendants were still entitled to judgment as a matter of law because Defendants believed they were entitled to various forms of immunity.

In *Americans United*, this Court made a distinction between judicial and evidentiary admissions. With regard to statements of fact admitted during the summary judgment proceedings, the Court did not find such facts to be judicial admissions, except to the extent the parties had specifically stipulated to those facts pursuant to a pretrial order. Rather, the Court stated that it would deem summary judgment admissions as evidentiary admissions at trial, only to the extent that such admissions were made unequivocally and there was no showing of a change in material facts that would render the admission untrue. *Americans United*, 395 F. Supp. 2d at 809. Indeed, the Court specifically identified a situation similar to the present one where facts ad-

mitted for purposes of summary judgment would *not* be deemed admissible at trial: "For instance, it is conceivable a party would stipulate to a fact simply in order to make a concession for the purposes of summary judgment, that is, for the sake of argument. Of course, such intent must be made explicit when making the admission." *Id.* at 809 n.5.

The only place where Defendants did not explicitly state that they were admitting Plaintiffs' facts solely for purposes of summary judgment is in their response to Harrington's Statement of Additional Facts. While the Court could certainly find on that basis that the statements are judicial admissions, the Court declines to do so on the basis of what seems obvious by the record to be an inadvertent omission on the part of the Defendants.

Plaintiffs urge that if the statements are not deemed judicial admissions, they should be deemed evidentiary admissions under Federal Rules of Evidence 801(d)(2)(A), (d)(2)(B) and 401-03. Federal Rule of Evidence 801(d) provides that a statement is not hearsay, and is admissible at trial if the statement is: "offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth." Fed. R. Evid. 801(d)(2)(A-B). Plaintiffs argue that the admissions of fact by Defendants with respect to Harrington's Statement of Additional Facts "were not made *arguendo*, but were made as simple uncontested facts in the case." Again, viewing the record as a whole, the Court finds that Defendants' failure to specifically state that they were admitting Harrington's Statement of Material Facts solely for purposes of

the motion for summary judgment amounts to nothing more than an inadvertent omission. The present situation represents precisely the type of scenario the Court in *Americans United* foresaw as being a situation where admissions at the summary judgment stage should not be deemed admissions at trial.

II. HARRINGTON'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PRIOR CONVICTION (HARRINGTON CLERK'S NO. 129)

Harrington requests the Court exclude from trial all evidence pertaining or referring to Harrington's 1977 conviction for robbery, pursuant to Federal Rules of Evidence 404(b), 403, and 609. On May 26, 1977, Harrington (then aged 16) participated in a robbery by driving a vehicle while another youth robbed a convenience store. Less than $60.00 was taken and Harrington received $16.00 for his part in the crime. Harrington pleaded guilty to robbery. He was charged and convicted as an adult, despite his legal status as a minor at the time of the crime.

Federal Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

> preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).

Defendants argue that evidence of Plaintiff's prior conviction for robbery will not be offered as either character evidence under Rule 404 or impeachment evidence under Rule 609 (permitting some convictions to be admitted as evidence, subject to Rule 403, for the "purpose of attacking the character for truthfulness of a witness"). Rather, evidence of the prior conviction will be offered with regard to Harrington's claimed damages. Specifically, Harrington plans to call an expert named Stephen Skulsky, a Clinical Psychologist, to discuss Harrington's "despair . . . about a concern of who would hire him to work with their family [in light of Harrington taking classes in family sciences after his release from prison] given his prior conviction, even though it was overturned—for the murder of a retired police officer." Clerk's No. 151 (Defs. Resistance) at 2. Defendants argue that if Plaintiff was concerned about his vacated murder conviction, it is reasonable to think he should have been concerned about his conviction for robbery bearing on his ability to gain employment in his chosen field.

The Court finds that evidence of Harrington's prior conviction would be relevant to the issue of

damages if Plaintiff offers evidence that his conviction for Schweer's murder impaired his ability to find a job in his chosen field. The Court also recognizes that the danger of admitting evidence of Plaintiff's prior conviction is great, as a jury could mistakenly believe that evidence of Harrington's robbery conviction is somehow evidence that he had a propensity to commit murder. The Court believes, however, that the danger of unfair prejudice can be minimized by providing a limiting instruction to the jury that evidence of Plaintiff's prior conviction can only be considered on the issue of damages. Accordingly, should Defendants desire to offer such evidence to rebut and mitigate a claim by Plaintiff at trial that his conviction might impede his ability to get a career in family sciences, Defendants shall request permission of the Court, outside the presence of the jury, to offer such evidence. If at that time, the Court finds that evidence of Plaintiff's robbery conviction is sufficiently relevant to be admissible, it will permit the evidence and issue a limiting instruction. Under no circumstances should mention of the conviction be made without explicit advance Court permission given during the trial.

III. HARRINGTON'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF A SHOTGUN IN TERRY HARRINGTON'S VEHICLE (HARRINGTON CLERK'S NO. 130)

Harrington next requests the Court issue an order excluding from trial all evidence in any form that individuals saw a shotgun in the trunk or backseat of Harrington's vehicle prior to the Schweer murder. Plaintiff argues that there is no foundation for the admittance of such evidence, pursuant to Federal Rule of Evidence 901 ("The requirement of authen-

tication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). Plaintiff also argues that the evidence is hearsay under Federal Rule of Evidence 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."). Finally, Harrington argues that evidence that he owned a shotgun is wholly irrelevant because the gun recovered from Harrington was not the weapon used to kill John Schweer.

Defendants counter that Harrington owned a .410 shotgun and testified that he never carried it in his car. Other witnesses, however, including Curtis McGhee, have stated that Harrington regularly carried and removed a shotgun from his car. Defendants claim that evidence pertaining to Harrington having a shotgun in his car is relevant to the "res gestae" of Defendants, i.e., the evidence is probative of why authorities investigated, arrested, and prosecuted Harrington. Specifically, Defendants claim that the evidence made it clear to them that Harrington had two guns, the .410 which he never kept in his car, and another that he did keep in his car.

Since a significant portion of Harrington's complaint is his allegation that police lacked probable cause to arrest him in the first instance, the Court must conclude that evidence that Harrington kept a shotgun in his trunk is relevant to what information was known to authorities and whether such information was sufficient to establish probable cause—both issues for the jury to determine.

With regard to Harrington's argument that there is no foundation for the admission of evidence pertaining to Harrington's possession of a shotgun, the Court is without sufficient information to permit it to make a ruling on the foundational objection at this time. With regard to the hearsay objection, the Court must conclude that such evidence could be admissible to demonstrate the legitimacy of Defendants' actions toward Plaintiff, to the extent that the evidence is not offered to demonstrate the truth of the matter asserted (i.e., Defendants cannot offer the evidence to show that Harrington did, in fact, carry a shotgun in the trunk of his car). Finally, to the extent Harrington argues that the evidence is more prejudicial than probative, the Court must disagree. As noted, the evidence is probative on the question of whether police had probable cause to suspect and arrest Harrington for the murder of John Schweer. Any potential prejudicial effect of the evidence (i.e., implying to the jury that because Harrington had a shotgun, he must have killed Schweer) can be mitigated by the issuance of an appropriate limiting instruction.

Since the exact contours of any potential shotgun evidence are undefined, the Court will ask that the parties refrain from mentioning any such evidence in the presence of the jury without first explaining to the Court the nature of the evidence and receiving a specific ruling. This will permit opposing counsel to lodge any specific foundational or other objections, and will permit the Court to make a more informed decision on the admissibility of such evidence, and to fashion a limiting instruction if needed.

IV. HARRINGTON'S MOTION IN LIMINE TO EXCLUDE CURTIS MCGHEE'S STATEMENT THAT TERRY HARRINGTON POINTED A GUN AT HIM (HARRINGTON CLERK'S NO. 131).

Harrington's next motion seeks to exclude at trial all evidence that Terry Harrington pointed a gun at Curtis McGhee. Plaintiff argues that the only reason such evidence would be offered by the Defendants is to ask the jury to infer that if Terry Harrington pointed a gun at Curtis McGhee, he could certainly have pointed a gun at John Schweer. As with the prior motion, however, Defendants argue that McGhee's testimony is relevant because Harrington denied carrying his .410 shotgun in his car, but McGhee testified that Harrington pulled a shotgun out of the trunk of his car and pointed it at him. As discussed, *supra*, this evidence may well be relevant to the jury's determination of whether Defendants had probable cause to suspect and arrest Harrington for Schweer's murder. As with the Court's generalized ruling on the admissibility of shotgun evidence above, however, the Court will entertain specific objections prior to this evidence being presented to the jury, and will issue an appropriate limiting instruction, if necessary. Accordingly, the parties should refrain from mentioning McGhee's testimony that Plaintiff pointed a shotgun at him until it receives a ruling at trial from the Court on the matter.

V. DEFENDANTS' MOTION IN LIMINE WITH REGARD TO ANTICIPATED TESTIMONY OF PLAINTIFF CURTIS MCGHEE (HARRINGTON CLERK'S NO. 133; MCGHEE CLERK'S NO. 151)

Defendants request an order precluding Plaintiff Curtis McGhee from offering testimony concerning statements allegedly made by unidentified staff

members of the Pottawattamie County Jail following his conviction. Specifically, Defendants object to any testimony that staff members purportedly called McGhee a "cop killer," a "nigger," or threatened to have unknown associates "waiting on you [McGhee] when you get to Iowa," on the basis that such testimony is hearsay. Both Plaintiffs counter that such testimony is not hearsay and is relevant to demonstrate the racially biased and derogatory treatment they received as a result of their wrongful incarceration.

The Court agrees with Plaintiffs that the testimony may be relevant to Plaintiffs' damages and that the testimony cannot be barred by the hearsay rule. Rule 801(c) of the Federal Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." It is clear that Plaintiffs do not seek to offer the statements of the unknown jail staff to demonstrate that he was, in fact and truth, a "cop killer," a "nigger," or that the jail staff would actually have unknown associates "waiting for" McGhee. Accordingly, Defendants' motion is denied.

VI. DEFENDANTS' MOTION IN LIMINE REGARDING ANTICIPATED TESTIMONY OF CARL WRIGHT (HARRINGTON CLERK'S NO. 134; MCGHEE CLERK'S NO. 152)

Defendants seek to exclude from trial any evidence by Plaintiffs' witness Carl Wright that race played a role in the filing of criminal charges against the Plaintiffs for the murder of John Schweer. Mr. Wright was Terry Harrington's former football coach and will be offered as a lay witness to testify to his

belief that he was with Terry Harrington at the time Schweer was murdered. At deposition, Mr. Wright also commented that he believes that the fact that Terry Harrington was a young, black male at the time of the events giving rise to this case played an important factor in his conviction.

Federal Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and © not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. "Personal knowledge or perception acquired through review of records prepared in the ordinary course of business, or perceptions based on industry experience, is a sufficient foundation for lay opinion testimony." *Burlington N. Ry. Co. v. State of Neb.*, 802 F.2d 994, 1004 (8th Cir. 1986). Defendants argue that Mr. Wright gave an "off the cuff opinion" about the role he believed race played in the filing of criminal charges against Harrington, but did not identify any factual inquiries or observations he had to support his opinion. Plaintiffs counter, however, that Mr. Wright can testify about his own inferrences drawn from his perception of racial issues at the time.

The Court believes that if an adequate factual foundation is laid for Mr. Wright's opinion, that it *may* be admissible. However, based on the information currently known to the Court, there is insufficient evidence of the basis of Mr. Wright's knowledge to permit his testimony at this time. Defendants' motion is, therefore, preliminarily granted. The Court will, however, entertain an offer of proof made outside the presence of the jury to determine if Mr. Wright does, in fact, have a sufficient basis of personal knowledge to opine about whether race played a factor in the arrest and conviction of Plaintiffs for Schweer's murder. Until such an offer of proof and ruling is complete, however, the parties shall refrain from discussing Mr. Wright's opinion testimony in the presence of the jury.

VII. DEFENDANTS' MOTION IN LIMINE RE: REPRESENTATION OF PRIMMER (HARRINGTON CLERK'S NO. 137; MCGHEE CLERK'S NO. 157)

Defendants request an order barring Plaintiffs from offering evidence that Defendant David Richter represented Chad Primmer in a case involving allegations of rape (and potentially others allegations). Chad Primmer represented Plaintiff Curtis McGhee during his first year of legal practice while Mr. Richter was serving as the Pottawattamie County Attorney. Defendants urge that such evidence is not probative of any fact in the case, or that if the evidence is probative, its probative value is substantially outweighed by its prejudicial effect. Plaintiffs resist the motion and argue that the evidence is admissible to establish the biased relationship between Mr. Primmer and Mr. Richter. This is

important, Plaintiffs claim, because Primmer is expected to testify on behalf of the Defendants at trial regarding his representation of Curtis McGhee, including the negotiations that took place regarding McGhee's plea agreement and regarding evidence and reports contained in the criminal file obtained from McGhee's trial counsel.

Plaintiffs are entitled to challenge the credibility of witnesses by showing their biases or prejudices.

> The credibility of witnesses is always a material issue, so the only question of materiality or relevance when evidence is offered to impeach for bias is whether the evidence tends in reason to demonstrate the existence of some fact, state of mind or condition that a reasonable person would take into account in assessing the credibility of the witness under attack. As we pointed out above, the balance must be weighed in favor of admissibility where impeachment for bias is the object.

Johnson v. Brewer, 521 F.2d 556, 561 (8th Cir. 1975). The Court believes the fact that a witness at trial who at one point represented a Plaintiff, but at a prior point was represented himself by a Defendant, could lead a reasonable jury to question the credibility of that witness' testimony. Accordingly, the Court will permit Plaintiffs to ask Mr. Primmer generally about Mr. Richter's previous representation of him. The Court believes this can be accomplished, however, without referencing the precise nature of the charges involved. Rape and similar allegations

are highly inflammatory, and may encourage the jury to make credibility findings about Mr. Primmer on the basis of the charges against him (charges which were ultimately dismissed), rather than on the legitimate basis of his relationship with Mr. Richter.

VIII. DEFENDANTS' MOTION IN LIMINE RE: LIABILITY INSURANCE (HARRINGTON CLERK'S NO. 138; MCGHEE CLERK'S NO. 158)

Defendants next ask the Court to bar from trial all evidence of and references to liability insurance, self-insurance, or risk pool enrollment. Federal Rule of Evidence 411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Fed. R. Evid. 411. Plaintiff requests that the Court deny the Defendants' motion to exclude evidence of liability insurance, self-insurance, or risk pool enrollment to the extent that such evidence is admissible under the exception for the admissibility of such evidence under Rule 411. Plaintiffs do not, however, articulate how this evidence is likely admissible in the present case. Accordingly, the Court preliminarily grants Defendants' motion. Should Plaintiffs find it necessary to offer evidence of liability insurance, self-insurance, or risk pool enrollment for a permissible purpose during the trial, they shall

petition the Court to offer such evidence outside the presence of the jury and before the introduction of such evidence.

IX. DEFENDANTS' MOTION IN LIMINE RE: COMPROMISE AND OFFERS TO COMPROMISE (HARRINGTON CLERK'S NO. 139; MCGHEE CLERK'S NO. 159)

Defendants move in limine for an order excluding from trial all evidence of and references to compromise, offers to compromise, or conduct or statements made in compromise negotiations or settlement conferences by Defendants. Federal Rule of Evidence 408 provides:

> (a) Prohibited uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations regarding the claim, except when offered

> in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
>
> (b) Permitted uses.—This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

As with their resistance to Defendants' request to bar evidence of liability insurance, Plaintiffs ask that the Court deny the Defendants' motion to exclude evidence of settlement negotiations to the extent such evidence is permissible under Rule 408. Again, Plaintiffs do not articulate the context in which such evidence is likely to arise in the present case. Accordingly, the Court preliminarily grants Defendants' motion. Should Plaintiff find it necessary to offer evidence of offers to compromise or settlement negotiations for a permissible purpose during the trial, they shall petition the Court to offer such evidence outside the presence of the jury and before the introduction of such evidence.

X. DEFENDANTS' MOTION IN LIMINE RE: IMMUNIZED ACTS (HARRINGTON CLERK'S NO. 141; MCGHEE CLERK'S NO. 161)

Defendants next move in limine for an order prohibiting Plaintiffs from offering evidence of or referring to any acts of the Defendants held immune by the Court. Defendants' motion was filed prior to this Court's ruling on the parties' dispositive motions. As such, the motion and supporting brief do not specify any particular matters that should be deemed barred in light of the Court's ultimate ruling on immunity. Accordingly, the motion is denied. Defendants may, however, request at trial that the Court limit the use of certain evidence in accordance with the Court's ruling on the dispositive motions.

XI. MCGHEE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF 1985 PRISON DEMONSTRATION (MCGHEE CLERK'S NO. 155)

McGhee asks the Court to exclude from admission at trial any evidence of his participation in a 1985 demonstration at the Nebraska Penal Complex. Apparently, McGhee served a portion of his life sentence for the first-degree murder of John Schweer at the Nebraska Penal Complex in Lincoln, Nebraska, pursuant to an interstate compact. In 1985, McGhee was transferred to Fort Madison because of his alleged involvement in an inmate demonstration protesting prison conditions. McGhee claims that inmates with knives prevented him from leaving the yard during this incident. McGhee's involvement in the incident was never adjudicated.

Defendants resist McGhee's motion and argue that evidence dealing with the nature of McGhee's

confinement, the conditions of his confinement, his places of confinement, and the reasons for that confinement are admissible since Plaintiff is presumably requesting damages incurred as a result of his confinement. The Court does not believe that it possesses sufficient information at this juncture to make an informed ruling on the admissibility of the evidence. At this time, then, the Court orders that the parties shall refrain from discussing the 1985 inmate demonstration in the presence of the jury. Should Defendants decide, upon seeing what evidence of damages McGhee presents at trial, that questioning about the 1985 inmate demonstration is relevant and admissible, Defendants shall petition the Court for permission to introduce such evidence. The Court will then make a ruling and permit or exclude the evidence at that time.

XII. MCGHEE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF 1987 PRISON DISCIPLINE (CLERK'S NO. 154)

McGhee next moves to exclude from admission at trial any evidence of discipline McGhee received in 1987 while in prison in Fort Madison. Specifically, in 1987, Mcghee was disciplined for his alleged involvement in a conspiracy to take staff hostage, kill them, and escape. McGhee denies he was involved in any such scheme.

Defendants resist McGhee's motion on the same basis that it resisted his motion to exclude evidence of the 1985 inmate demonstration, that is, Defendants argue that evidence dealing with the nature of McGhee's confinement, the conditions of his confinement, his places of confinement, and the reasons for that confinement are admissible since Plaintiff is presumably requesting damages in-

curred as a result of his confinement. As with the prior motion, the Court does not believe that it possesses sufficient information at this juncture to make an informed ruling on the admissibility of the evidence. At this time, then, the Court orders that the parties shall refrain from discussing the 1987 disciplinary matter in the presence of the jury. Should Defendants decide, upon seeing what evidence of damages McGhee presents at trial, that questioning about the 1987 disciplinary matter is relevant and admissible, Defendants shall petition the Court for permission to introduce such evidence. The Court will then make a ruling and permit or exclude the evidence at that time.

XIII. HARRINGTON'S MOTION IN LIMINE TO EXCLUDE IOWA DEPARTMENT OF CORRECTIONS RECORDS AND PARTIALLY JOIN IN PLAINTIFF MCGHEE'S MOTION IN LIMINE TO EXCLUDE 1987 PRISON DISCIPLINE (HARRINGTON CLERK'S NO. 142)

Harrington asks the Court to exclude from trial any evidence of Mr. Harrington's Iowa Department of Corrections file, as well as any reference to its contents. Harrington also joins in McGhee's request to exclude evidence of a 1987 disciplinary proceeding. According to Harrington, he was implicated in the same hostage plot as McGhee, however, there was no evidence that he was actually involved in any way. Harrington's only punishment was a reprimand for speaking briefly with others who were suspects.

As with the previous two motions, Defendants resist Harrington's motion because they argue that all evidence regarding Plaintiffs' confinement is relevant to the issue of damages. As the Court has pre-

viously stated, it lacks sufficient information to make an informed ruling on the motion at this juncture. Accordingly, the parties shall refrain from discussing the 1987 disciplinary matter and Harrington's Iowa Department of Corrections file in the presence of the jury. Should Defendants decide, upon seeing what evidence of damages Harrington presents at trial, that questioning about such matters is relevant and admissible, Defendants shall petition the Court for permission to introduce such evidence. The Court will then make a ruling and permit or exclude the evidence at that time.

XIV. CONCLUSION

For the reasons stated herein, the Court makes the following rulings on the parties' pending motions:

- Harrington's Rule 104 Motion for Judicial Admission of Fact (Harrington Clerk's No. 123) is DENIED.
- McGhee's Motion to Join Harrington's Motion (McGhee Clerk's No. 146) is GRANTED.
- Harrington's Motion in Limine to Exclude Evidence of Prior Conviction (Harrington Clerk's No. 129) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- Harrington's Motion in Limine to Exclude Evidence of a Shotgun in Terry Harrington's Vehicle (Harrington Clerk's No. 130) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- Harrington's Motion in Limine to Exclude Curtis McGhee's Statement that Terry Har-

rington Pointed a Gun at Him (Harrington Clerk's No. 131) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.

- Defendants' Motion in Limine with Regard to Anticipated Testimony of Plaintiff Curtis McGhee (Harrington Clerk's No. 133; McGhee Clerk's No. 151) is DENIED.
- Defendants' Motion in Limine Regarding Anticipated Testimony of Carl Wright (Harrington Clerk's No. 134; McGhee Clerk's No. 152) is GRANTED, however upon an offer of proof at trial, the Court will reevaluate the admissibility of the evidence.
- Defendants' Motion in Limine Regarding Representation of Primmer (Harrington Clerk's No. 137; McGhee Clerk's No. 157) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- Defendants' Motion in Limine Regarding Liability Insurance (Harrington Clerk's No. 138; McGhee Clerk's No. 158) is GRANTED, however upon an offer of proof at trial, the Court will reevaluate the admissibility of the evidence.
- Defendants' Motion in Limine Regarding Compromise and Offers to Compromise (Harrington Clerk's No. 139; McGhee Clerk's No. 159) is GRANTED, however upon an offer of proof at trial, the Court will reconsider the admissibility of the evidence.
- Defendants' Motion in Limine Regarding Immunized Acts (Harrington Clerk's No.

141; McGhee Clerk's No. 161) is DENIED as premature and incomplete.

- McGhee's Motion in Limine to Exclude Evidence of 1985 Prison Demonstration (McGhee Clerk's No. 155) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- McGhee's Motion in Limine to Exclude Evidence of 1987 Prison Discipline (McGhee Clerk's No. 154) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.
- Harrington's Motion in Limine to Exclude Iowa Department of Corrections Records and to Partially Join in Plaintiff McGhee's Motion in Limine to Exclude 1987 Prison Discipline (Harrington Clerk's No. 142) is GRANTED IN PART and DENIED IN PART, consistent with the terms of this order.

IT IS SO ORDERED.

Dated this 27th day of February, 2007.

/s/
ROBERT W. PRATT, Chief Judge
U.S. DISTRICT COURT

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(7)

Supreme Court, U.S.
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No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

CURTIS W. MCGHEE JR.
AND TERRY J. HARRINGTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation and then introduced that same testimony against the defendant at trial.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Eighth Circuit (Pet. App. 1a-20a) is reported at 547 F.3d 922. The district court's opinion (Pet. App. 21a-155a) is reported at 475 F. Supp. 2d 862.

JURISDICTION

The Eighth Circuit entered judgment on November 21, 2008. The petition for a writ of certiorari was filed on February 18, 2009, and was granted on April 20, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

The plaintiffs in this case, Terry J. Harrington and Curtis W. McGhee Jr. ("respondents"), were tried and convicted in 1978 for the murder of an auto dealership security guard in Council Bluffs, Iowa. The Iowa Supreme Court vacated Harrington's conviction in 2003, based on a finding that petitioners had failed to disclose exculpatory evidence of an alternative suspect. *Harrington* v. *State*, 659 N.W.2d 509 (Iowa 2003). Following that decision, McGhee, whose conviction was based on essentially the same facts and evidence, entered an *Alford* plea to second-degree murder in exchange for a sentence of time served. Harrington was not retried.

In 2005, respondents sued petitioners in the United States District Court for the Southern District of Iowa under 42 U.S.C. § 1983, alleging *inter alia* that former county attorneys Joseph Hrvol and David Richter had coerced false testimony from third-party witnesses, then introduced that same testimony at respondents' trials. Respondents also alleged that petitioners had withheld exculpatory evidence of an alternative suspect.[1]

Petitioners moved for summary judgment based on absolute immunity, qualified immunity, and other defenses. In an opinion and order issued February 23, 2007, the district court dismissed claims against petitioners that were based on withholding of exculpatory evidence. Petitioners were absolutely immune

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[1] For purposes of this immunity argument, respondents' allegations are assumed to be true. If this matter were to go to trial, petitioners would vigorously dispute respondents' allegations.

from those claims, the district court held, because "failure to turn over exculpatory evidence is necessarily a function intimately associated with the judicial process." Pet. App. 85a (citing *Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.34 (1976)). The alleged withholding of exculpatory evidence is not at issue in this proceeding.

The district court denied immunity, however, to the extent that respondents' claims arose from allegations that petitioners had coerced false testimony from witnesses that was later introduced at trial and resulted in respondents' convictions. The court held that such allegations were "sufficient to state a substantive due process claim." Pet. App. 104a. Petitioners' pre-trial acts, the district court said, "could be viewed as causatively violating [respondents'] rights to a fair trial." *Id.* at 83a.

In holding that petitioners could be subjected to a § 1983 suit for procurement and use of false testimony, the district court expressly rejected contrary authority from the Seventh Circuit. Pet. App. 104a. In *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) (Easterbrook, J.), cert. denied, 513 U.S. 1085 (1995), the Seventh Circuit held that a prosecutor's procurement of false testimony, without more, does not violate any of a criminal defendant's constitutional rights.[2] Further, the Seventh Circuit explained, the *use* of such testimony in judicial pro-

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[2] To avoid confusion with an earlier decision by this Court in the same case, *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), which is discussed elsewhere in this brief, petitioners will refer to the Seventh Circuit decision as "*Buckley II*."

ceedings would be shielded by absolute immunity. *Ibid.*

In this case, the district court rejected the Seventh Circuit's analysis as "unpersuasive," Pet. App. 104a, instead relying on the dissent in *Buckley II*. The district court opined that a prosecutor "should not be immune from § 1983 liability" for procuring false testimony, because such conduct "'ripen[s] into a § 1983 cause of action * * * by use of the perjured testimony at trial.'" *Id.* at 107a (quoting *Buckley II*, 20 F.3d at 800 (Fairchild, J., dissenting)). The district court denied petitioners' arguments that procurement of false evidence does not, in itself, violate any clearly established constitutional right, and that absolute immunity shields the later use of that evidence in trial. As a result, the court allowed respondents to seek to hold petitioners liable under § 1983 for the consequences of the use of the testimony at trial, namely, respondents' convictions and incarcerations.

Petitioners appealed to the Eighth Circuit under the collateral order doctrine. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985). In accordance with the Seventh Circuit's decision in *Buckley II*, they argued that only the use of false testimony, not its mere procurement, could have violated Harrington and McGhee's constitutional rights, and that the use of such testimony at trial was shielded by absolute immunity. Pet. App. 17a-18a.

The Eighth Circuit rejected this argument. Pet. App. 18a-19a. With only brief discussion, it affirmed the district court's analysis, holding that a prosecutor's procurement of false testimony "violates a [criminal defendant's] substantive due process rights." *Id.* at 19a. The Eighth Circuit acknowledged

that petitioners "have absolute immunity for their use of [perjured testimony] at trial." Pet. App. 18a. But it held that a prosecutor has *no* immunity "where the prosecutor was accused of *both* fabricating evidence *and then using the fabricated evidence at trial*," resulting in a post-trial "deprivation of liberty." Pet. App. 18a (citing *Zahrey* v. *Coffey*, 221 F.3d 342, 349 (2d Cir. 2000)) (emphasis added).

Thus, in ostensibly denying *qualified* immunity for *procurement* of false testimony, the courts below went further and abrogated *absolute* immunity for the *use* of that testimony *at trial*, thereby making petitioners potentially liable for conviction and incarceration.

SUMMARY OF THE ARGUMENT

I.

Petitioners are absolutely immune from claims that they introduced perjured testimony at respondents' trials. Such claims go to the heart of a prosecutor's function as an advocate for the state in judicial proceedings. The courts below should not have abrogated petitioners' absolute immunity where the alleged constitutional injury was a conviction in violation of due process. Because the claims in this case arise solely from the effect of perjured testimony used at trial, respondents have failed to state a cause of action that may proceed under § 1983.

II.

Instead of analyzing the relevant fair trial claims in this case, the courts below focused on pre-trial conduct, namely the alleged coaching or coercion of witnesses who would testify at trial. This error led to three incorrect conclusions. First, the courts below found that the challenged pre-trial conduct is enti-

tled only to qualified immunity, when in fact it is entitled to absolute immunity because it was directly connected with the trial and respondents' injuries at trial. Second, the courts below postulated a substantive due process right against procurement of perjured testimony, a right never recognized by this Court. Finally, the courts applied a proximate cause analysis, under which petitioners' conduct *before* trial prospectively vitiated their absolute immunity *at* trial, which is inconsistent with this Court's § 1983 decisions. All of these rulings conflict with this Court's decisions and the policy underlying the absolute immunity doctrine. Liability against a prosecutor for the outcome of a trial—here, a conviction in violation of due process—may not be predicated on conduct before trial.

III.

In side-stepping the proper analysis of respondents' trial claims, the courts below treated this case as if it were about malicious prosecution. It is not. Petitioners were absolutely immune for their decision to initiate the prosecution as well as for their conduct at trial. Moreover, they are immune for any acts in connection with respondents' arrests.

ARGUMENT

In *Imbler* v. *Pachtman*, this Court's foundational case on prosecutorial immunity, Paul Imbler alleged that a prosecutor had framed him by engaging in a broad "conspiracy" with police officers "unlawfully to charge and convict him." 424 U.S. at 416. Focusing on the relevant constitutional injury, this Court identified as the "gravamen" of Imbler's claim that the prosecutor had knowingly presented false testimony, thus depriving Imbler of a fair trial. *Ibid.*

Looking to the common law as well as "considerations of public policy," the Court held that a prosecutor must be immune from such a claim. 424 U.S. at 421-429. A prosecutor must carry out his work "with courage and independence," and have "wide discretion in the conduct of the trial and the presentation of evidence." *Id.* at 423, 426. The threat of liability could shade his professional decisions, and the constant threat of civil suits would divert time and energy. "Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Id.* at 425. Just as troubling, such suits "would require a virtual retrial of the criminal offense in a new forum." *Ibid.*

Imbler recognized that a prosecutor may have only qualified immunity for "certain investigative activities." *Id.* at 430. Accordingly, in subsequent decisions, this Court developed a "functional approach" to immunity. See *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 269 (1993). Under this function test, a prosecutor is absolutely immune for acts that are "intimately associated with the judicial phase of the criminal process." *Id.* at 270. The *Buckley* court reaffirmed "the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Id.* at 273.

In this case, respondents advance the same claim this Court rejected in *Imbler*. They allege that petitioners "conspired" to "frame" them for murder. Harrington Opp. 10; McGhee Opp. 1. In the end, how-

ever, what respondents seek under § 1983 are damages based on their convictions and incarcerations.

Respondents recognize that *Imbler* bars any claim for use of perjured testimony at trial. They also recognize that perjuring witnesses themselves cannot be sued, because their testimony is absolutely immunized. See *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). Respondents therefore asked the lower courts to direct their attention away from trial, where the convictions occurred, and focus instead on the investigation where petitioners allegedly conspired to frame them.

The courts below did so. All but ignoring *Imbler*, and misconstruing *Buckley*, they looked past the relevant constitutional injury at trial and purported to find an injury arising from petitioners' conduct before the trial. A prosecutor's procurement of false testimony, they said, was a "substantive due process" violation. Compounding this error, they reasoned that when a prosecutor procures false testimony, his immunity for use of that same evidence at trial is of no benefit. Neither qualified nor absolute immunity applies, the Eight Circuit held, "where the prosecutor [is] accused of both fabricating evidence and then using the fabricated evidence at trial." Pet. App. 18a. That analysis finds no support in this Court's immunity or § 1983 jurisprudence.

If respondents were wrongfully convicted, they were deprived of their due process right to a trial that was untainted by perjured testimony. But petitioners had absolute immunity for their actions at trial, including the use of perjured testimony. Moreover, where respondents allege that petitioners' pretrial acts were directly connected to injuries that oc-

curred at trial, those pre-trial acts necessarily were immunized as well.

Thus, respondents have failed to state a cause of action that may proceed under § 1983. If a prosecutor's absolute immunity at trial means anything, it is that a prosecutor may not be subjected to a damages suit when those proceedings end in a conviction.

I. PETITIONERS ARE ABSOLUTELY IMMUNE FROM ANY CLAIM ARISING FROM RESPONDENTS' TRIALS.

The courts below erroneously abrogated immunity because they failed to apprehend the relevant constitutional injury for which respondents have sued: their convictions at trial. A prosecutor is absolutely immune from such a claim because it goes to the heart of his function as an advocate for the state in judicial proceedings.

A. Where False Testimony Results In A Conviction, Any Constitutional Claim Arises From The Due Process Right To A Fair Trial.

If a conviction results from perjured testimony at trial, the defendant has been denied the due process right to a fair trial. *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959) ("a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment"). But it is the *use at trial* of the perjured testimony, not any antecedent act, that imposes the constitutional injury.

As this Court's cases make clear, the proscription against perjured testimony is a trial right. See, *e.g.*, *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) ("allegations that [a criminal defendant's] imprisonment resulted

from perjured testimony, knowingly used by the State authorities to obtain his conviction * * * sufficiently charge a deprivation of rights guaranteed by the Federal Constitution"); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) ("a trial" may not be a "pretense" to deprive a defendant of liberty "by the presentation of testimony known to be perjured"). The right established by "*Mooney* and its progeny" is "a constitutional obligation of the prosecution * * * not to deceive the fact finder or allow it to be deceived by the prosecution witnesses." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1109-1110 (3d ed. 2000).

Moreover, it is the conviction itself, not simply the use of perjured testimony, that violates due process. A conviction may not be reversed based on a claim of perjured testimony unless the testimony was material to the finding of guilt and its admission was not harmless error. See *Arizona* v. *Fulminante*, 499 U.S. 279, 295 (1991); *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against *conviction* except upon proof beyond a reasonable doubt") (emphasis added); LAFAVE, CRIMINAL PROCEDURE, *supra*, at 1110 (the Court "has refused to go so far as to hold that the knowing failure to correct false testimony produces a due process violation without regard to whether the false testimony was likely to have had an impact upon the outcome of the trial").

This Court's decisions on other constitutional guarantees that protect criminal defendants are consistent. For example, eliciting a false confession does not violate the Fifth Amendment unless the confession was actually introduced at trial. *Chavez* v. *Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion) (the self-incrimination guarantee is a "trial right").

Nor does a suggestive preindictment identification procedure inherently intrude on a constitutionally protected interest. *Manson* v. *Brathwaite*, 432 U.S. 98, 113 n.13 (1977). Rather, a violation occurs when "a fair trial [i]s impaired by the admission of testimony regarding the unreliable identification." *Wray* v. *City of New York*, 490 F.3d 189, 193 (2d Cir. 2007); see also *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978) (where police obtain evidence by searching a third party's property, the defendant's own Fourth Amendment rights are not violated; he "is aggrieved * * * *only through the introduction* of [the] damaging evidence") (emphasis added).

Even with regard to prophylactic requirements such as *Miranda* warnings, most courts have rejected § 1983 damage claims based on police failure to give the warnings, because a "violation occurs only when self-incriminating statements are introduced at trial, thereby compelling the defendant to 'become a witness against himself.'" *Riley* v. *Dorton*, 115 F.3d 1159, 1165 (4th Cir. 1997) (en banc); see also Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 487 n.182 (2002) (collecting cases).

B. *Imbler* Bars Any Claim For Respondents' Trial Injuries.

1. Assuming that respondents were wrongfully convicted, they were denied the due process right to a fair trial. The alleged use of perjured testimony by petitioners is the "gravamen" of their claims. *Imbler*, 424 U.S. at 416.

But an allegation that a prosecutor "knowingly used false testimony" is precisely the claim that *Imbler* bars. 424 U.S. at 413. "Prosecutors are entitled

to absolute immunity for actions as advocates * * * at trial even if they present unreliable or wholly fictitious proofs." *Buckley II*, 20 F.3d at 795 (citing *Buckley*, 509 U.S. 259 n.3, and *Burns* v. *Reed*, 500 U.S. 478, 489-490 & n.6 (1991)). Where an injury occurs as part of the judicial process, the rule of immunity is "categorical[]." *Kalina* v. *Fletcher*, 522 U.S. 118, 126 (1997). Respondents' claims necessarily fail because they fall squarely within the heartland of absolute immunity.

These claims may not be recharacterized as anything but what they are: trial violations. A due process claim based on a conviction cannot be predicated on a wrongful investigation, because there is no due process right not to be accused of a crime based on unreliable evidence. *Albright* v. *Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion) (rejecting a "claim to be free from prosecution except on the basis of probable cause"); *id.* at 283 (Kennedy, J., concurring in the judgment) ("the due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution"). Even those Justices who have suggested such an extension of due process have never intimated that it would abrogate *Imbler* and allow a § 1983 plaintiff to sue a prosecutor for malicious prosecution. See *id.* at 291-316 (Stevens, J., dissenting).

As this Court has explained, the Due Process Clause may not be twisted "into a rule of virtually unqualified liability" for wrongful government conduct. "Such an approach * * * would destroy 'the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.'" *Anderson* v. *Creighton*, 483 U.S. 635, 639

(1987) (quoting *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984)). Because § 1983 is not a "font of tort law," *Paul* v. *Davis*, 424 U.S. 693, 701 (1976), this Court's jurisprudence has "tailor[ed] liability to fit the interests protected by the particular constitutional right in question." *Townes* v. *City of New York*, 176 F.3d 138, 148 (2d Cir. 1999) (citing *Carey* v. *Piphus*, 435 U.S. 247, 258-259 (1978)).

Focusing on the relevant constitutional injury preserves the principle that in a § 1983 suit, "compensation for violations of constitutional rights should encompass only constitutionally relevant injuries—that is, injuries within the risks that the constitutional prohibition seeks to avoid." John C. Jeffries Jr., *Damages for Constitutional Violations: the Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1461 (1989). The risk that the due process guarantee seeks to avoid is not wrongful investigation or wrongful accusation, but only wrongful conviction.

2. This understanding is consistent with this Court's teaching in *Buckley* that in evaluating "whether a complaint has adequately alleged a cause of action for damages" that is not barred by immunity, it is the "location of the injury" that is "relevant." 509 U.S. at 271-272.

In *Buckley*, the petitioner alleged that prosecutors had "violated his constitutional rights in presenting * * * fabricated evidence to * * * his trial jury," 509 U.S. at 267 n.3—the same injury that respondents allege in this case. The lower courts held that those actions were protected by absolute immunity. This Court observed that those holdings were "made according to traditional principles of absolute

immunity under § 1983," *ibid.*, and were "undisturbed by this opinion," *id.* at 279.

Writing for four Justices, Justice Kennedy took pains to underscore this point—indeed, he anticipated exactly the scenario here: that a court would deny immunity based on its failure to apprehend the constitutional injury that was relevant to the plaintiff's claim for damages. He observed that "it appears that the only constitutional violations" caused by the fabricated evidence in *Buckley* "occurred within the judicial process," and thus could not state a cause of action against a prosecutor under § 1983. 509 U.S. at 285 (Kennedy, J., concurring in part and dissenting in part).

Justice Scalia, who provided the fifth vote for the majority, amplified this point. Buckley's false-evidence claims likely could not form any cause of action under § 1983, he explained, because there is "no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." 509 U.S. at 281 (Scalia, J., concurring). And for the prosecutors' "knowing *use* of fabricated evidence before the grand jury and at trial—acts which might state a [fair-trial] claim for denial of due process, see, *e.g.*, [*Mooney*]—the traditional defamation immunity provides *complete protection* from suit under § 1983." *Ibid.* (emphasis added).

3. The district court here observed that "[i]f [police] officers use false evidence" at trial, "including false testimony, to secure a conviction, the defendant's due process is violated." Pet. App. 105a (quoting *Wilson* v. *Lawrence County*, 260 F.3d 946, 954 (8th Cir. 2001) (citing *Napue* and *Mooney*)). But that

observation was irrelevant because police and prosecutors play fundamentally different roles at trial.

These different roles at trial require different immunities. Police officers have qualified immunity because, unlike prosecutors, they are not advocates in judicial proceedings and are not authorized to introduce evidence; their work is "further removed from the judicial phase of criminal proceedings." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986). "Policemen do not have any control over state prosecutors as to the conduct of criminal proceedings." *Smith* v. *Holtz*, 30 F. Supp. 2d 468, 477 (M.D. Pa. 1998), aff'd, 210 F.3d 186 (3d Cir. 2000); see also *Wray*, 490 F.3d at 193 (where "a fair trial [i]s impaired by the admission of [unreliable] testimony * * * the due process focus is principally on the fairness of the trial, rather than on the conduct of the police"). By contrast, giving a prosecutor only qualified immunity at trial would "impair the performance of a central actor in the judicial process." *Malley*, 475 U.S. at 343.

Like any witness, a police officer would have absolute immunity for actual testimony at trial, even if the officer commits perjury. *Briscoe*, 460 U.S. at 342-345. Thus, like a prosecutor serving as the state's advocate, a police officer who introduces false evidence through his own testimony cannot be sued under § 1983. The circuits disagree over whether and under what theory police officers, investigators, or technicians may be held liable for non-testimonial acts that contribute to a wrongful conviction.[3] This

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[3] For example, the Fifth Circuit, looking to *Napue*, considers it a due process violation when a police officer's acts cause a wrongful conviction. *Brown* v. *Miller*, 519 F.3d 231, 237 (5th Cir. 2008). The Seventh Circuit has held that where a police officer's fabrication of evidence causes

Court has not addressed the proper approach in such cases, and the question is not relevant here. At trial, petitioners functioned solely as prosecutors, and if they used perjured testimony to obtain respondents' convictions, those acts are absolutely immunized.

C. Courts Properly Evaluating § 1983 Claims Reject Attempts To Circumvent A Prosecutor's Immunity In Judicial Proceedings.

Courts that have correctly identified a constitutional violation occurring in judicial proceedings have declined to circumvent a prosecutor's absolute immunity from liability for that violation.

For example, in *Gonzalez* v. *City of New York*, 69 F. App'x 7 (2d Cir. 2003), plaintiff Saul Gonzalez claimed he had been wrongfully arrested and held in custody on the basis of mistaken identity. Although fingerprint analyses ordered by the prosecutor indicated that Gonzalez was not the perpetrator, the prosecutor repeatedly argued in court that Gonzalez was being properly detained. The district court held that the prosecutor was absolutely immune for Gonzalez's wrongful detention.

The Second Circuit affirmed. The court explained that Gonzalez's detention was not caused by the prosecutor's "investigation into his identity," but

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wrongful conviction, it is a *Brady* violation. *Manning* v. *Miller*, 355 F.3d 1028, 1034 (7th Cir. 2004). Other courts categorize such claims as malicious prosecution. *E.g.*, *Pierce* v. *Gilchrist*, 359 F.3d 1279 (10th Cir. 2004). Still other decisions have said that such claims against police for the false trial testimony of a witness are simply an inappropriate effort to circumvent the witness' immunity under *Briscoe*. *E.g.*, *Miller* v. *Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991).

rather by the prosecutor's arguments "that the evidence suggested appellant was [the perpetrator], despite the growing number of fingerprint analyses that strongly suggested otherwise." 69 F. App'x at 10. Because the prosecutor "was acting in her quintessential role as an advocate, arguing in court, she is entitled to absolute immunity for her actions and cannot be held liable for appellant's prolonged detention." *Ibid.*

As the Second Circuit earlier explained in *Lee* v. *Willins*, although the plaintiff had alleged falsification of evidence and coercion of perjured testimony by a prosecutor, "the injuries to [the plaintiff] that could result from these acts are * * * the deprivation of his liberty for five years, his subjection to the ordeal of multiple trials, and the emotional and economic injury resulting therefrom. These are precisely the alleged injuries for which *Imbler* granted absolute immunity." 617 F.2d 320, 322 (2d Cir. 1980); accord *Weinstein* v. *Mueller*, 563 F. Supp. 923, 927 (N.D. Cal. 1982) ("This court sees no difference * * * between the knowing use of perjured testimony and the solicitation of it. If prosecutorial immunity did not cover the latter as well as the former, the protections of *Imbler* would disappear simply by the addition of another stock allegation").

Similarly, the Ninth Circuit held that when a prosecutor is alleged to have participated in a conspiracy to rig a trial, it is the location of the "ultimate acts" responsible for the conviction, not the "act of conspiring," that is relevant for applying immunity. *Ashelman* v. *Pope*, 793 F.2d 1072, 1077-1078 (9th Cir. 1986) (en banc). "There appears to be no other authority for making the underlying conspiracy

the determinative act in deciding whether immunity should be available." *Id.* at 1077.

The Seventh Circuit came to the same conclusion on remand from this Court's decision in *Buckley*. The relevant facts were virtually identical to the facts in this case. The plaintiff alleged that prosecutors had violated his constitutional rights by coercing false statements from third parties through use of reward money, then using this false testimony in Buckley's indictment and trial. *Buckley II*, 20 F.3d at 794-795.

This Court directed the court of appeals to address Buckley's claim that "prosecutors violated his rights under the Due Process Clause through extraction of statements implicating him by coercing two witnesses and paying them money." 509 U.S. at 279. The Seventh Circuit found that Buckley had not identified "any case holding that this practice violates the Constitution. * * * His contention that the [reward money] payments [to witnesses] themselves violate the due process clause does not state a claim on which relief may be granted." *Buckley II*, 20 F.3d at 794; accord *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

If a prosecutor actually *used* such false testimony in judicial proceedings, absolute immunity would shield him from a damages suit. The Seventh Circuit explained that "if the constitutional entitlement is a right to prevent use of [false evidence] at trial * * * then absolute immunity under *Imbler* defeats Buckley's claim." 20 F.3d at 795 (citing *Buckley*, 509 U.S. at 267 n.3; *Burns*, 500 U.S. at 489-490 & n.6).

The analysis of these courts is sound. "[E]vents not themselves supporting recovery under § 1983 do not become actionable because they lead to injurious

acts for which the defendants possess absolute immunity." *Buckley II*, 20 F.3d at 796. The courts below failed to recognize this principle.

D. This Court Has Consistently Reaffirmed The Rationales For Absolute Immunity.

Application of absolute immunity may "leave[] victims of egregious prosecutorial misconduct without a remedy." *Michaels* v. *McGrath*, 531 U.S. 1118, 1119 (2001) (Thomas, J., dissenting from denial of certiorari). But this Court has repeatedly reaffirmed that this unavoidable consequence of *Imbler* is outweighed by the policies underlying the absolute immunity doctrine.

Imbler candidly acknowledged that a prosecutor's absolute immunity "does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." 424 U.S. at 427. Yet this Court has reaffirmed the controlling rationales for absolute immunity—protecting prosecutorial independence, discouraging meritless claims, avoiding relitigation of criminal appeals—even while acknowledging that it represents a "balance" of "evils." *Id.* at 428; *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 859 (2009); accord *Buckley*, 509 U.S. at 270 n.4.

Lower courts may not fashion theories that create loopholes in *Imbler*. For the functions to which it applies, absolute immunity must be a bright-line rule. It must "defeat[] a suit at the outset," rather than depend on "the circumstances and motivations" of the prosecutor's conduct. *Imbler*, 424 U.S. at 419 n.13. Otherwise, it is nothing more than a pleading rule and may be defeated by a plaintiff who is "clever enough to include some actions taken by the prosecu-

tor prior to the initiation of prosecution." *Buckley*, 509 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part). Absolute immunity is "*immunity from suit* rather than a mere defense to liability," *Scott* v. *Harris*, 550 U.S. 372, 376 n.2 (2007), and that immunity is lost if a prosecutor is forced to defend actions that *Imbler* intended to place outside the reach of a § 1983 suit.

In summary, respondents' claims arise solely from their trials, because they have alleged that they were wrongfully convicted. Petitioners are absolutely immune from suit for their acts at trial, including the introduction of perjured testimony. Respondents have failed to state a cause of action that may proceed under § 1983.

II. LIABILITY FOR RESPONDENTS' TRIAL INJURIES MAY NOT BE PREDICATED ON PETITIONER'S PRE-TRIAL ACTS.

Rather than assess the relevant fair trial claim in this case, the courts below focused on petitioners' acts *before* trial—specifically, the allegation that petitioners had suborned perjury by coaching or coercing the witnesses who would later testify.

First, the courts found that petitioners had only qualified immunity for these pre-trial acts. Then, they postulated that a prosecutor's procurement of perjured testimony for later use at trial violates a criminal defendant's substantive due process rights. Finally, the courts below compounded these errors by applying a proximate cause analysis that is unrecognized in this Court's § 1983 decisions, under which acts taken *before* trial prospectively vitiate a prosecutor's absolute immunity *at* trial. Each of these rulings conflicts with this Court's jurisprudence.

A. Absolute Immunity Applies To Pre-Trial Acts That Are "Directly Connected" To A Prosecutor's "Conduct Of A Trial."

1. While qualified immunity is the default rule for administrative and investigative acts performed by a prosecutor, absolute immunity applies to pre-trial acts that a plaintiff alleges were directly responsible for a trial injury.

The principle that pre-trial acts do not acquire absolute immunity simply *because* a prosecutor performs them is intended to assure that plaintiffs may recover for a prosecutor's constitutional torts that produce injuries *outside* the judicial process. "Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he has no greater claim to complete immunity than activities of police officers allegedly acting under his direction." *Buckley*, 509 U.S. at 274; see also *Burns*, 500 U.S. at 494 (absolute immunity is reserved for "actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct"); *Taylor* v. *Kavanagh*, 640 F.2d 450, 453 (2d Cir. 1981) (distinguishing between "injuries related solely to the prosecution itself" and "alleged harm [that] is inflicted independently from the prosecution," such as an illegal search). This makes sense, because an illegal search is not a part of judicial proceedings, and the injury to the victim's Fourth Amendment interests is complete when the search occurs.

A prosecutor's absolute immunity in judicial proceedings does not "retroactively" shield investigative or administrative work that has with no connection to the judicial proceedings. *Buckley*, 509 U.S. at 276. But here, the courts below took the reasoning that was rejected in *Buckley* and applied it in the other

direction. They assumed that petitioners had only qualified immunity for pre-trial acts, and then pushed that liability forward to *prospectively* abrogate absolute immunity for use of the evidence at trial. See Pet. App. 17a-18a, 108a. That reasoning is flawed.

2. As discussed in Part I, *supra*, respondents' claim is for a trial injury, and absolute immunity bars that claim. Where a plaintiff claims that a prosecutor committed a pre-trial act with the intent to affect the trial, as respondents allege here, that particular pre-trial act is absolutely immunized as well.

This principle was given effect in a unanimous decision last term, in which the Court recognized that despite the default rule of qualified immunity for a prosecutor's administrative activities, a prosecutor has absolute immunity for those administrative activities that are alleged to have caused a trial violation. *Van de Kamp*, 129 S. Ct. at 862. In *Van de Kamp*, the petitioner alleged that a prosecutor's due process violation in failing to disclose impeachment material was attributable to the failure of supervisory prosecutors to provide training and maintain proper information systems. In holding that the challenged administrative acts were absolutely immune, the Court distinguished them from other administrative duties such as hiring. The administrative activities challenged by the petitioner were absolutely immune because they involved "a *certain kind* of administrative obligation—a kind that itself is *directly connected with the conduct of a trial*." *Van de Kamp*, 129 S. Ct. at 862 (emphasis added).

The same analysis applies here. Despite the presumptive rule of qualified immunity for a prosecutor

who participates in the investigation of a crime, the claims in this case focus on a "certain kind" of investigative act—procurement of false testimony for later use at trial—that "is directly connected with the conduct of a trial." *Van de Kamp*, 129 S. Ct. at 862. As the Court explained, this conduct was "'intimately associated with the judicial phase of the criminal process' *because it concerned the evidence presented at trial*." *Ibid.* (quoting *Buckley*, 509 U.S. at 430) (emphasis added).

Respondents allege that petitioners coerced various witnesses to provide "trial testimony" against respondents. Harrington Compl. ¶ 130. Petitioners allegedly "knew that their whole case against Harrington and McGhee hinged on the coerced and coached statement of" witness Kevin Hughes. *Id.* ¶ 199; accord McGhee Compl. ¶ 165. Petitioners allegedly worked with Hughes on his testimony because they knew of an alternative suspect and were concerned that without such coaching, "a jury might reject [Hughes'] story." McGhee Compl. ¶ 166. Such "an out-of-court 'effort to control the presentation of [a] witness' testimony' [i]s entitled to absolute immunity because it [i]s 'fairly within [the prosecutor's] function as an advocate.'" *Buckley*, 509 U.S. at 272-273 (quoting *Imbler*, 424 U.S. at 430 n.32).

The fact that procuring false testimony might be *improper* trial preparation is irrelevant, since *Imbler* allows a prosecutor to present false testimony at trial without risk of liability. Respondents allege that petitioners' acts were "connected with [their] role in judicial proceedings," *Burns*, 500 U.S. at 494; they tie these allegations directly to the conviction they suffered at trial. Thus, these pre-trial acts are immune.

This Court emphasized in *Buckley* that it "ha[s] not retreated * * * from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." 509 U.S. at 273. It recognized that "'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.'" *Id.* at 272 (quoting *Imbler*, 424 U.S. at 431 n.33). *Buckley* rejected the argument that absolute immunity "extends only to the act of initiation itself and to conduct occurring in the courtroom. This extreme position is plainly foreclosed by our opinion in *Imbler* itself." *Ibid.*

In the district court's view, petitioners' pre-trial acts "causatively violat[ed] the [respondents'] rights to a fair trial." Pet. App. 83a. If that is true, then it would be inconsistent, result-oriented reasoning to also conclude that these acts were too remote from the trial to be encompassed by absolute immunity. Such logic would open the door for other § 1983 plaintiffs to evade absolute immunity by purporting to attack the preparation rather than the immunized activity itself. Expanding liability in that way also would discourage the responsible and necessary involvement by prosecutors in overseeing investigations, something that is routine for federal as well as local prosecutors.

This understanding is consistent with the functional approach to immunity because "advocacy [does not] have an inherent temporal limitation." *Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part).

> It may be that a prosecutor and a police officer are examining the same evidence at the same time, but the prosecutor is examining the evidence to determine whether it will be persuasive at trial and of assistance to the trier of fact, while the police officer examines the evidence to decide whether it provides a basis for arresting a suspect. The conduct is the same but the functions distinct.

Ibid.

In short, if petitioners coerced perjured testimony, those acts are absolutely immune because, based on respondents' own allegations, the acts "concerned the evidence presented at trial." *Van de Kamp*, 129 S. Ct. at 862.

B. There Is No "Substantive Due Process" Claim For A Wrongful Investigation.

1. According to the district court, "Plaintiffs' claims that the prosecutors manufactured, coerced, and fabricated evidence against them is [sic] sufficient to state a substantive due process claim." Pet. App. 103a-104a. The Eighth Circuit agreed, stating that "immunity does not extend to the actions of a [prosecutor] who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not a distinctly prosecutorial function." Pet App. 19a. These holdings were erroneous.

Relocating a constitutional violation from trial to investigation in this way finds no support in this Court's § 1983 jurisprudence. Further, it would gut *Imbler*, or at least reduce absolute immunity to a pleading rule. Such a theory "simply reframe[s the] claim to attack the preparation" for a prosecution

"instead of the absolutely immune actions themselves." *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part).

Given that "the guideposts for responsible decisionmaking" in the "unchartered area" of substantive due process "are scarce and open-ended," *Collins* v. *Harker Heights*, 503 U.S. 115, 125 (1992), lower courts should not expand existing rights using substantive due process simply because they wish to compensate a sympathetic plaintiff. As this Court has recognized, the federal judiciary is not empowered to fashion compensation schemes for wrongful conviction in the absence of a cognizable cause of action under § 1983. *Briscoe*, 460 U.S. at 344 n.30. That responsibility lies with the states.

2. This Court has never suggested that the act of procuring false testimony is a stand-alone constitutional tort. There is no substantive due process claim for malicious prosecution, *Albright*, 510 U.S. at 270 n.4 (plurality opinion), and "no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring); see also *Chavez*, 538 U.S. at 776 (plurality opinion) (no substantive due process right against self-incriminating interrogation); *Rakas*, 439 U.S. at 134. Applied to the gathering of evidence in an investigation, substantive due process has no footing in this Court's decisions and certainly involves no right that is "clearly established." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

The district court opined that if petitioners fabricated or coerced witness testimony, this behavior implicated substantive due process because it was

"shocking to the conscience." Pet. App. 104a. But not everything that is said to shock the conscience is a substantive due process violation.

This Court has explained that to shock the judicial conscience, government action must be "arbitrary" and "unrestrained by the established principles of private right and distributive justice." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845 (1998). Thus, if a prosecutor uses perjured testimony at trial to obtain a conviction, such conduct is shocking to the conscience—which is why this Court has recognized for more than half a century that such behavior is proscribed by an "established principle[] of private right": the Fourteenth Amendment due process right to a fair trial. But no matter how troubling it may be if prosecutors suborn perjury during an investigation, a criminal defendant suffers no constitutional deprivation if the false evidence is simply placed in a drawer. Only its use in judicial proceedings causes injury.

3. If respondents were wrongfully convicted, that injury necessarily occurred at trial. But this Court has never described Fourteenth Amendment fair trial rights as implicating *substantive* due process. See *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) ("By requiring the government to follow appropriate *procedures* when its agents decide to deprive any person of life, liberty, or property" as in a trial, "the Due Process Clause promotes fairness in such decisions") (emphasis added); *Castellano* v. *Fragozo*, 352 F.3d 939, 968 (5th Cir. 2003) (Higginbotham, J.) (Supreme Court's decisions make clear that "fabricated evidence and perjured testimony * * * [implicate] procedural, not *substantive*, due process").

Claims that a prosecution was pursued improperly "should be analyzed not under the substantive due process approach * * * but under the language of the Constitution itself." *Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001). "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright*, 510 U.S. at 273 (plurality opinion); accord *United States* v. *Lanier*, 520 U.S. 259, 272 n.7 (1997). Thus, a claim for arrest without probable cause is a Fourth Amendment, not a substantive due process, claim, *Albright*, 510 U.S. at 273 (plurality opinion), as is a claim for excessive use of force, *Graham v. Connor*, 490 U.S. 386, 397 (1989).

As discussed in Part I, *supra*, because respondents seek damages for their convictions, their claims rest on a violation of the due process right to a fair trial. Such a claim is barred against a prosecutor by absolute immunity. Respondents may not evade this analysis by recharacterizing their injuries as substantive due process violations.

C. Absolute Immunity May Not Be Abrogated On A Theory Of Proximate Cause.

1. Having postulated a constitutional violation before trial, the courts below then used it to abrogate petitioners' trial immunity, relying on the Second Circuit's decision in *Zahrey*. See Pet. App. 18a-19a; 107a-109a. *Zahrey* involved a prosecutor who allegedly fabricated evidence against a New York City police officer for use in criminal and police disciplinary proceedings. The target of the proceedings was in-

dicted and arrested based on the false evidence, but was subsequently acquitted.

Zahrey announced a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity." 221 F.3d at 349. The *Zahrey* court created this right out of whole cloth, focusing on the prosecutor's investigation but citing only cases that deal with rights applicable in trial or other judicial proceedings. *Id.* at 355 (citing *Napue*, *Pyle*, and *Mooney*).

Significantly, the deprivation of liberty in *Zahrey* was limited to the period between arrest and trial. Because Zahrey was acquitted, the Second Circuit had no basis to consider whether a prosecutor who procures false evidence could also be held liable for conviction and post-trial incarceration. Yet that is the context in which the Eighth Circuit applied *Zahrey* here.

2. If a prosecutor fabricated evidence during an investigation, the *Zahrey* court said, then "it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that Zahrey would be indicted and arrested." 221 F.3d at 354. In other words, based on an investigative act, a prosecutor could be held liable for injuries that did not occur until a judicial proceeding.

In making the crux of the analysis whether a constitutional violation in judicial proceedings is "reasonably foreseeable" from an investigation, *Zahrey* resorted to proximate-cause reasoning from the common law of torts that this Court has rejected. Unlike the common law of torts, the Fourteenth Amendment is not concerned with "dut[ies]" to avoid

harm or whether breach of such duties may "be said * * * to have proximately caused" later injuries. *Martinez* v. *California*, 444 U.S. 277, 285 (1980). Indeed, the Court cited *Palsgraf* v. *Long Island R.R. Co.*, 248 N.Y. 339 (1928)—the classic "foreseeability" tort case—as an example of the kind of analysis that does not apply in § 1983 cases.

Moreover, applying ordinary tort reasoning to a case like this one is inappropriate because there is no common law tort analogue for denial of due process at trial. See Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 14 (1980); *Imbler*, 424 U.S. at 441 (White, J., concurring in the judgment) (besides malicious prosecution, "[t]here were simply no other causes of action at common law brought against prosecutors for conduct committed in their official capacity"). The purpose of § 1983 is to compensate victims for deprivations of recognized constitutional rights, and this Court's decisions teach that concepts drawn from "common-law traditions must be rejected where they conflict with the goals of the civil rights statute." Whitman, *Constitutional Torts*, at 17.

The *Zahrey* court invoked a statement from *Monroe* v. *Pape* that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 221 F.3d at 349 (quoting 365 U.S. 167, 187 (1961)). But that statement pertains to whether a § 1983 action requires a showing of specific intent. *Monroe*, 365 U.S. at 187. It does not authorize creative theories of tort liability that are unmoored from specific constitutional guarantees. Common law rules "defining the elements of damages and the prerequisites for their recovery" provide only the "start-

ing point for the inquiry under § 1983." *Carey*, 435 U.S. at 257-258. "Although the common law tort serves as an important guidepost for defining the constitutional cause of action, the ultimate question is always whether the plaintiff has alleged a constitutional violation." *Pierce* v. *Gilchrist*, 359 F.3d 1279, 1289 (10th Cir. 2004) (McConnell, J). Applying the common law tort principle of "natural consequences" in this way would fly in the face of this Court's teaching that § 1983 is not a "font of tort law." *Paul*, 424 U.S. at 701. Where the relevant constitutional right applies in judicial proceedings, as with use of perjured testimony, proximate cause reasoning simply circumvents *Imbler*'s rule of absolute immunity.

3. *Zahrey* also cannot be squared with longstanding precedent. An analysis based on "foreseeability" is another way of saying that a prosecutor's investigative acts set the stage for a suspect to be charged and convicted, or at least made conviction at trial more likely. But that argument depends on a form of but-for reasoning that was rejected more than 80 years ago.

This Court has repeatedly cited *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926), summarily aff'd, 275 U.S. 503 (1927), for the proposition that a prosecutor cannot be held liable for eliciting false testimony from witnesses. *E.g.*, *Imbler*, 424 U.S. at 422; *Burns*, 500 U.S. at 490. In *Yaselli*, the prosecutor was accused not only of using false evidence, but also of having "conspired to prosecute [the] plaintiff maliciously" and obtaining a government appointment specifically "for the purposes of the prosecution." 12 F.2d at 407. But this did not deprive the prosecutor of immunity for the injurious conduct itself:

> The important fact is that he was appointed to the office, and, having been appointed, the public interests require that he shall be free and fearless to act in the discharge of his official duties. If he cannot be charged with acting willfully and maliciously after he gets appointed to the office, no more can he be charged with having conspired to get into the office in order to act willfully and maliciously after he gets his appointment. * * * We are unable to distinguish between the two cases in principle.

Ibid.

If a prosecutor does not lose immunity for maliciously creating circumstances that allow him to bring a wrongful prosecution in the first place, he certainly cannot lose immunity for helping to create the circumstances that allow him to obtain a conviction in judicial proceedings. If the act at trial is immunized, the preparatory acts cannot abrogate that immunity.

In the end, it is impossible to reconcile *Zahrey* with *Buckley*. *Zahrey* violates the function test by eliding the distinction between a prosecutor's investigative and advocacy roles. If a prosecutor is absolutely immune for conduct in a judicial proceeding, *Imbler*, 424 U.S. at 430-431, then saying it was "reasonably foreseeable" that the prosecutor would introduce false evidence that he had earlier procured "simply reframe[s the] claim to attack the preparation instead of the absolutely immune actions themselves." *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part).

A final reason to reject a proximate cause theory is that it would demote absolute immunity to nothing more than a pleading rule. On a mere allegation of wrongful investigative conduct, a prosecutor would be "made to answer in court each time such a person charged him with wrongdoing," and this "would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury." *Imbler*, 424 U.S. at 425. Such a rule would nullify absolute immunity in judicial proceedings and promote "vexatious litigation that might have an untoward effect on the independence of the prosecutor." *Burns*, 500 U.S. at 492.

In summary, liability against a prosecutor for his conduct at trial cannot be predicated on pre-trial acts. There is no freestanding constitutional right against an improper investigation. Where the actual injury occurs in judicial proceedings, the prosecutor is absolutely immune.

III. RESPONDENTS' TRIAL CLAIMS MAY NOT BE RECHARACTERIZED AS MALICIOUS PROSECUTION CLAIMS.

The question whether § 1983 allows some form of federal claim for "malicious prosecution" is not presented in this case. That issue was not briefed in prior proceedings, and the courts below did not address it. Nonetheless, it is apparent that malicious-prosecution reasoning found its way into the lower courts' analyses, a further reason why the decision below should be reversed.

A. A Prosecutor's Absolute Immunity May Not Be Circumvented Through Malicious Prosecution Reasoning.

1. Judge Fairchild's dissent in *Buckley II*, on which the district court expressly relied, see Pet. App. 106a-107a, is a quintessential example of malicious prosecution reasoning. Judge Fairchild did not dispute the majority's conclusion that "a prosecutor is not liable for the result of his wrongful act * * * where the immediate cause of the impairment is an act as to which the prosecutor is immune." 20 F.3d at 800 (Fairchild, J., dissenting). Instead, he argued that Buckley's constitutional rights had been impaired because "there would not have been either an indictment or trial if some of the prosecutors had not fabricated evidence and suborned perjury." *Ibid.*

If *procuring* false testimony works no cognizable constitutional injury and *using* it at trial is absolutely immunized, then the but-for reasoning in Judge Fairchild's opinion can only mean that a prosecutor wrongfully instituted criminal proceedings. Such an analysis would be flawed and unsupported by controlling precedents.

The courts below opined that "[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty." Pet. App. 18a. But under the facts alleged in this case, such reasoning is misplaced.

A malicious prosecution claim may lie against a police officer who deceives a prosecutor into filing criminal charges. See, *e.g.*, *Jones* v. *City of Chicago*,

856 F.2d 985, 994 (7th Cir. 1988). The officer's deception subverts the prosecutor's "independent judgment" and is therefore the cause of the prosecution. *Townes*, 176 F.3d at 147. But here, petitioners are not alleged to have defrauded anyone into filing false charges; they did not go from being malicious investigators to "unsuspecting" prosecutors. The cause of the prosecution was the "independent judgment" of petitioners themselves. If there is no deception—that is, if the prosecutor knows there is no probable cause, but proceeds anyway—then the constitutional harm necessarily flows from the prosecutor's immunized acts of "initiating and pursuing a criminal prosecution." *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring). Stretching to find a malicious prosecution theory against a prosecutor in these circumstances would be truly "anomalous." *Ibid.* Justices Stevens and Blackmun would have found a 14th Amendment due process violation against the police officer in *Albright* "who attested to the criminal information" without probable cause, *id.* at 292 (Stevens, J., dissenting), but nowhere suggested that this principle could be applied against a prosecutor in a way that would affect absolute immunity under *Imbler*.

Indeed, attempting to hold a prosecutor liable in damages for such an injury is precisely what *Imbler* forbids. If a prosecutor is immune both for "initiating a prosecution" without probable cause, as well as "presenting the State's case" at trial, *Imbler*, 424 U.S. at 431, then it is truly "perverse" to abrogate absolute immunity from damages for prosecution and conviction on the rationale that the prosecutor conducted a wrongful investigation before he filed the wrongful charges. A prosecutor's decision to pursue an improper prosecution necessarily involves

some premeditation, but the harm flows from the charges themselves, not from the investigation.

2. Under the function test, if a prosecutor serves as an affiant or complaining witness for an arrest or a criminal information, that act receives only qualified immunity. *Kalina,* 522 U.S. at 129-131. But there is no evidence or allegation that petitioners personally vouched for facts or in any other way served as complaining witnesses. The "preliminary informations"—under Iowa law at the time, the complaints that accused Harrington and McGhee of murder and asked that they be "arrested and dealt with according to law"—were sworn out by a police officer and endorsed by a magistrate. See J.A. 54. It is undisputed that neither Richter nor Hrvol personally arrested Harrington or McGhee, and there is no evidence in the record that either signed a complaint or affidavit to support the arrest. Instead, they signed the "True Information," *i.e.*, the formal charging document that followed the arrest. See Petitioners' C.A. App. 245-267.

Under *Kalina*, "[o]nly where the prosecutor acts as a complaining witness in this setting will he or she lose absolute immunity protection." 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 7:47 (4th ed. 2008); accord *Ireland* v. *Tunis*, 113 F.3d 1435, 1447 (6th Cir. 1997) (absolute immunity gives way to qualified immunity "when a prosecutor or other official switches from presenting the charging document to vouching personally for the truth of the contents of the document"); *cf. Wilkins* v. *DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008) (§ 1983 claim stated where police officers who "knowingly supplied false information in affidavits" instituted legal process).

The courts below apparently viewed petitioners as the *equivalent* of complaining witnesses. But there is neither factual nor legal support for such a notion; it is simply an attempt to "reframe [the] claim to attack the preparation instead of the absolutely immune actions themselves." *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part). Insisting, counterfactually, that petitioners were acting as police officers rather than prosecutors when they initiated the prosecution simply manipulates the function test and imposes liability that *Imbler* would bar.

3. Although *Buckley* observed that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested," 509 U.S. at 274, that language must be read in the larger context of this Court's immunity jurisprudence. As four Justices observed in that case:

> We were quite clear in *Imbler* that if absolute immunity for prosecutors meant anything, it meant that prosecutors were not subject to suit for malicious prosecution. Yet the central component of a malicious prosecution claim is that the prosecutor in question acted maliciously and *without probable cause*. If the Court means to withhold absolute immunity whenever it is alleged that the injurious actions of a prosecutor occurred before he had probable cause to believe a specified individual committed a crime, then no longer is a claim for malicious prosecution subject to ready dismissal on absolute immunity grounds, at least where the claimant is clever enough to include some actions taken by the

> prosecutor prior to the initiation of prosecution.

509 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part).

This Court has held fast to the principle that a prosecutor may not be sued for malicious prosecution. It affirmed in a unanimous opinion last term that *Imbler* "granted prosecutors absolute immunity from common-law tort actions, say, those underlying a 'decision to initiate a prosecution.'" *Van de Kamp*, 129 S. Ct. at 860 (quoting *Imbler*, 424 U.S. at 421). Justice Ginsburg has observed that a "'malicious prosecution' theory" would be "anomalous" against a prosecutor—who is "[t]he principal player in carrying out a prosecution"—because he would be "exonerated" by absolute immunity. *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring).

If Harrington and McGhee were wrongfully prosecuted, it was because Hrvol and Richter, functioning as prosecutors, filed criminal charges without probable cause. "[T]he prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction," and "[e]xposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work." *Malley*, 475 U.S. at 343. For that act, petitioners had absolute immunity. Any attempt to recharacterize it is simply an end run around *Imbler*.

B. Petitioners Also Are Immune From Any Claim Based On Respondents' Arrests.

As with malicious prosecution, the question presented in this case does not encompass respondents' arrests, but any theory under which petitioners could

be liable for the prosecutions and convictions based on arrest without probable cause is similarly insupportable.

The Fourth Amendment prohibits unreasonable search and seizure, but nothing petitioners did resulted in an unreasonable search or seizure. Respondents were not arrested until, as they allege, petitioners approved the filing of the preliminary informations that were signed by a police officer, which resulted in the issuance of arrest warrants under Iowa law. Respondents' decision to approve the charges in the preliminary informations was immunized. See *Kalina*, 522 U.S. at 129. Thus, petitioners' liability for a Fourth Amendment violation would require proof of an immunized charging decision, which makes such liability barred by prosecutorial immunity. *Van de Kamp*, 129 S. Ct. at 862.

In summary, petitioners were absolutely immune for their conduct at trial, and that immunity may not be circumvented by focusing on their decision to initiate the prosecution. That act was absolutely immune as well.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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In The Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

TERRY J. HARRINGTON
AND CURTIS W. McGHEE JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial.

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STATEMENT OF THE CASE

During the night of July 21, 1977, retired police officer John Schweer was killed while serving as a night watchman for several car dealerships in Council Bluffs, Iowa. His body was discovered the next morning with a 12-gauge shotgun wound to the chest. A 12-gauge shotgun shell was found at one of the dealerships, and there were footprints and paw prints near Schweer's body.

Schweer had retired from the police force less than a month before, and the police and prosecutors treated his murder like that of an officer. Petitioner David Richter was the Pottawattamie County Attorney at the time. Richter had been appointed County Attorney in 1976 and was to face the voters for the first time in 1978. McGhee CA8 App. 268. Richter confronted the daunting prospect of "campaigning in the face of Schweer's unsolved murder." Pet. App. 4a. Contemporaneous police reports confirm that Richter and Assistant County Attorney Joseph Hrvol actively participated in the murder investigation from its earliest stages, interviewing witnesses and doing ordinary police work. *See* J.A. 21-53; *see also* J.A. 56. Although not yet assigned the responsibility of prosecuting the case, Hrvol was "intensely involved" in the investigation from the beginning. *See* J.A. 56-58.

1. Early in the investigation, the prosecutors and police had more than a dozen suspects. J.A. 58. Neither respondent was among them. J.A. 58. Instead, in light of the crime-scene evidence, suspicion began to focus on a man who had been

seen walking a dog and carrying a shotgun near the dealerships in the days before the murder. The day after the murder, a police officer found shoe and paw prints west of the crime scene that were similar in type and size to those found at the scene. The investigators also learned that Schweer had chased a man with a dog and a rifle from one of the car lots the night before his murder. J.A. 42-43, 47-48.

Following these leads, Richter interviewed James Burke three days after the murder. J.A. 21-22, 63. Burke told Richter that he had seen a man with a shotgun and a dog running west of the crime scene two nights before the murder. J.A. 20-21, 34-36. Later, Richter interviewed David Waide about "subjects observed walking dogs in the South section of town." J.A. 23-24; *see also* J.A. 60. Waide said he had seen a man walking a dog near the crime scene during the evening hours in the days before the murder. Waide identified the man with the dog as Charles Gates. J.A. 24.

Investigators questioned Gates and even gave him a polygraph test. *See* J.A. 26-27. During the polygraph test, Gates denied owning a shotgun and shooting Schweer. *Id.* According to the written opinion analyzing the polygraph results, Gates's denials were "not truthful." J.A. 27. Petitioners received copies of the Gates polygraph report. *See* J.A. 63.

With suspicion fixed on Gates, Hrvol and a police officer canvassed the neighborhood near the crime scene, asking people whether they had seen any men walking dogs. *See* J.A. 49-53, 57. One

person said she had seen a man wearing overalls and a hat who was "always in the company of dogs." J.A. 49. The police report states that this was a "perfect description" of Gates. J.A. 50. Several others provided consistent descriptions. J.A. 50-52.

Investigators discovered that Omaha police suspected Gates in an unsolved 1963 murder. J.A. 26-27. A Council Bluffs police officer visited the Omaha address listed on Gates's driver's license and spoke to his former landlords and neighbors.[1] J.A. 28-33. They described him as a "spooky type individual" with three dogs that he walked "constantly." J.A. 28-29. One reported seeing Gates with a gun holster around his waist. J.A. 29-30. His former landlord found spent .38 caliber rounds and some extremely odd personal effects after Gates moved out. J.A. 32.

Richter and Hrvol were so focused on Gates that they took the rather extraordinary step of personally consulting with an astrologer about whether Gates committed the murder. J.A. 37-41. The police report documenting the meeting describes Gates as "our suspect in this matter." J.A. 40. After the prosecutors gave the astrologer Gates's date of birth, she "made a short astrological chart" and used the chart to describe Gates's supposed personality to the prosecutors. J.A. 40; *see also* J.A. 60. The astrologer promised to work

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[1] Council Bluffs is an almost-exclusively white suburb of Omaha, Nebraska. The crime scene is less than ten miles from downtown Omaha.

on more charts and to contact the County Attorney's Office with the results. J.A. 40-41.

2. Despite the substantial circumstantial evidence pointing to Gates, investigatory interest shifted away from Gates and toward a group of African-American teenagers thought to be part of a car-theft ring. On Schweer's first night as watchman, an Oldsmobile Cutlass was stolen. Appellants' CA8 App. 149. That car was recovered in Omaha on September 5, 1977. That same day, Council Bluffs police received reports that two cars had been stolen from dealerships in Fremont, Nebraska. Appellants' CA8 App. 90-93. Several days later, Nebraska police picked up three teenagers in one of the stolen Fremont cars. Appellants' CA8 App. 90, 153. One of the teenagers was Kevin Hughes, who at the age of sixteen already had sixteen arrests to his name.

When questioned by Fremont police, Hughes denied having stolen the car. Instead, he said three others—respondents Harrington and McGhee and Anthony Houston—had stolen the cars from the Fremont dealerships and the Cutlass from Council Bluffs. Appellants' CA8 App. 163. Upon hearing this information, the Nebraska authorities contacted the Council Bluffs police and told them that Hughes might have information regarding the Schweer murder. *See* Pet. App. 29a.

Council Bluffs detectives interviewed Hughes in Nebraska and told him that they knew he was responsible for the Schweer murder. However, if Hughes agreed to help the detectives solve the murder, the detectives said they would not charge

Hughes with the murder, they would help him with his numerous other pending charges, and he might receive a $5000 reward. Pet. App. 29a; J.A. 65.

Hughes initially gave a written statement that a "light skinned man," later identified as Steven Frazier, had murdered Schweer. Hughes said Frazier claimed to have killed a security guard while stealing a Lincoln Continental in Council Bluffs. Hughes was lying, and the authorities knew it: no Lincoln had been stolen. Pet. App. 29a-30a.

Hughes tried again and lied again. Hughes implicated Arnold Kelly. The authorities quickly learned that this was a lie: Kelly had been in Kansas City with the Job Corps at the time of the murder. Pet. App. 30a.

With Hughes's first two stories rejected as lies, Hughes turned to implicating Harrington, McGhee, and Houston. Hughes initially said he did not believe that Harrington, McGhee, or Houston was capable of murder. McGhee Dist. Ct. Supp. App. 328. But on September 30, 1977, Hughes gave a written statement relating that Harrington had told him that he killed Schweer with help from Houston and McGhee. Appellants' CA8 App. 183-84. This was clearly a lie: when Hughes was given a polygraph, he failed it and admitted his lie. Appellants' CA8 App. 178.

Undeterred, Hughes wrote out another statement. This time, Hughes claimed that he was near the crime scene when the murder occurred. According to his statement, Hughes waited in the car while Harrington, McGhee, and Houston killed

Schweer. Hughes claimed to have heard a shot and seen the others running back to the car from behind one of the dealerships. Appellants' CA8 App. 185-86. The Omaha police took Hughes to the crime scene to allow him to point out the activities he described. The Council Bluffs police met Hughes at the scene. When Hughes returned to Omaha from the crime scene, the Omaha police tape-recorded Hughes's statement. Appellants' CA8 App. 178. With Hughes's latest statement on tape, the Council Bluffs detectives and petitioner Hrvol went to Omaha and interviewed Hughes for two hours. Appellants' CA8 App. 179.

Petitioners and the detectives knew about Hughes's lies and inconsistencies. *See* J.A. 63. In addition to repeatedly lying about the identity of the murderer(s), failing the polygraph, and admitting his lies, Hughes had been demonstrably wrong about critical information. Hughes said the murder weapon was a pistol and then a 20-gauge shotgun. Appellants' CA8 App. 95. He was lying, and the authorities knew it: Schweer was killed with a 12-gauge shotgun. Hughes's September 30, 1977 statement placed the murder behind McIntyre Oldsmobile. Appellants' CA8 App. 185. Hughes was lying, and the authorities knew it: the murder occurred on the railroad tracks near O'Neill Datsun, down the street and on the opposite side of 32nd Avenue from McIntyre Oldsmobile. McGhee CA8 App. 69-72.

3. Neither the prosecutors nor the detectives considered Hughes a reliable witness. *See* J.A. 63. His September 30, 1977 statement was riddled with mistakes and clearly was insufficient for

probable cause. But the prosecutors and detectives determined to use Hughes anyway and to buttress his story enough to arrest Harrington and McGhee for the murder. They reminded Hughes that he would probably be charged with the murder if he did not cooperate. *See* J.A. 60-61. They falsely told him that Harrington and McGhee had signed statements accusing him of the murder that would be used against him if he did not continue to implicate them. Hrvol then offered Hughes the $5000 reward money in exchange for his false testimony. J.A. 65. After these threats and inducements, Hughes became much more cooperative. J.A. 61.

As they had from the earliest stages of the investigation, petitioners continued to work side-by-side with the Council Bluffs detectives in investigating the murder. J.A. 62. Richter and Hrvol received copies of all of the police reports, J.A. 59, 63, Hrvol attended practically every meeting with Hughes, J.A. 60, and Hrvol kept Richter apprised of the investigation, J.A. 59.

No evidence corroborated Hughes's account, so his story would have to bear the entire weight of his accusations against Harrington and McGhee. When Hrvol and the detectives interviewed Houston (whom Hughes had said participated in the murder), Houston told them he had been in jail at the time. Appellants' CA8 App. 215. The investigators confirmed this fact and confronted Hughes with it. Hughes admitted lying again and immediately changed his story to eliminate Houston and implicate only Harrington and McGhee. Appellants' CA8 App. 216.

To fill in the story's other obvious holes, the investigators—including Hrvol—took Hughes to the crime scene four or five times. J.A. 64. During those sessions, they provided Hughes with the known facts about the murder and helped him keep his story straight. J.A. 64. Hughes later testified that he never had any personal knowledge regarding Schweer's death—his only knowledge was fed to him by the police and the prosecutors. J.A. 64. (Indeed, petitioners so admit. J.A. 64, 74.) Hughes followed the cues given by the police and the prosecutors, correcting previous verifiable inaccuracies in his testimony. For example, after he learned that a 12-gauge shotgun shell was found at the scene, Hughes corrected his earlier statements that a pistol or 20-gauge shotgun was the murder weapon. In addition, after the walk-through sessions at the crime scene, Hughes changed his story to account for the location of Schweer's body, correcting his earlier statement that put the murder behind the wrong car dealership and away from the railroad tracks.

Thus, petitioners used Hughes as their mouthpiece to fabricate a phony case against Harrington and McGhee. They focused exclusively on Harrington and McGhee once they discovered Hughes's willingness to fabricate "eye-witness" testimony. Gates—the white brother-in-law of a Council Bluffs Fire Department captain, Pet. App. 26a—had been petitioners' "suspect in this matter," J.A. 40, and there was a strong circumstantial case against him. But rather than rely on circumstantial—but real—evidence, petitioners determined to use Hughes to frame Harrington and

McGhee—two African-American teenagers from across the state line.

In addition to shoring up Hughes's account, Hrvol and the detectives pressured Hughes's friends to corroborate aspects of his story. *See* J.A. 68-69. Hughes said Harrington and McGhee had picked him up on the night of the murder. The investigators met with Hughes's girlfriend, Candace Pride, who was in the stolen Fremont car with Hughes (and a friend named Roderick Jones) when the police stopped them. The investigators told Pride that Hughes would be charged with murder unless she said Harrington and McGhee had picked him up on the night of the murder. Pride signed a false statement to that effect. Pet. App. 34a. After the investigators placed Jones in a room with Hughes, Jones gave a false statement that he was with Hughes when Harrington and McGhee picked him up on the night of the murder. Pet. App. 33a. The investigators also questioned Clyde Jacobs—sometimes in the same room with Jones and Pride. Jacobs too falsely stated that Harrington and McGhee had picked Hughes up on the night of the murder. *See* J.A. 68. All these teenagers were told that they would go to jail if they did not corroborate Hughes's story. J.A. 68-69.

4. After spending more than a month fabricating evidence to frame Harrington and McGhee, petitioners followed through with their plan and used the fabricated evidence to arrest Harrington and McGhee and charge them with the Schweer murder. Immediately after the police and prosecutors had taken Hughes to the crime scene

on November 16, 1977, Richter took Hughes's sworn statement. J.A. 65. On November 16 and 17, 1977 preliminary informations signed by a detective and approved by Richter and Hrvol were filed. *See* J.A. 67. Harrington and McGhee were immediately arrested, and on February 17, 1978, a True Information was filed formally charging McGhee with first-degree murder. Pet. App. 36a. (A True Information charging Harrington with first-degree murder was not filed until May 8, 1978. Appellants' CA8 App. 245-67.)

With McGhee's trial looming, the investigators—including Hrvol—took additional steps to strengthen Hughes's false account. They contacted jailhouse informants about providing false testimony that would incriminate Harrington and McGhee. Promising leniency or favorable prison assignments, the detectives and Hrvol elicited three false statements from jailhouse informants. *See* J.A. 69-70.

Hughes's fabricated story was the centerpiece of the State's case at McGhee's trial. Besides Hughes, the State's witnesses included the two teenagers arrested with Hughes in the stolen car (his girlfriend Pride and Jones), Hughes's other girlfriend Linda Lee, Hughes's friend Jacobs, and the jailhouse informants. Hrvol presented the fabricated evidence through Hughes and these "corroborating" witnesses. Richter examined only two peripheral witnesses for the State and did not present any fabricated evidence.

McGhee was convicted of first-degree murder on May 11, 1978 and sentenced to life imprisonment

without parole. Harrington was convicted of first-degree murder on August 4, 1978 based on the same fabricated evidence and received an identical sentence. At sentencing, Harrington maintained his innocence:

> I just want you to know that no matter what happens, I know I'm innocent, and as long as, you know, I feel that inside, then I'm going to keep on fighting because I know I can't see myself locked up for the rest of my life for something I didn't do. . . . I feel like I was judged by the color of my skin and not the content of my character, and I'll always feel that way until I get, you know, the kind of verdict the testimony shows, and that's innocent or not guilty as they would say in the courtroom.

Harrington v. State, 659 N.W.2d 509, 523 n.10 (Iowa 2003).

5. Harrington and McGhee had spent nearly 20 years in prison when a barber at the Iowa State Penitentiary where Harrington was imprisoned requested and received a copy of the Council Bluffs Police Department's complete file on the Schweer murder. That file contained numerous police reports that documented the evidence pointing to Gates and the early investigative focus on him. *See* J.A. 21-53. None of those reports had been provided to Harrington or McGhee or their counsel. In fact, in the course of testifying and responding to formal requests in proceedings since the 1978 convictions, the prosecutors and detectives had repeatedly and falsely denied that there were any

suspects other than Harrington or McGhee and maintained that the "man and a dog" (*i.e.*, Gates) was "never found or identified." *E.g.*, J.A. 58-59.[2]

Harrington filed a new post-conviction relief petition in state court in 2001, based in part on the wrongfully-withheld police reports. The trial court denied relief, but the Iowa Supreme Court reversed, holding that petitioners had violated Harrington's due process rights by not disclosing material, exculpatory evidence. *See Harrington*, 659 N.W.2d at 525. Noting that "Hughes, the primary witness against Harrington, was by all accounts a liar and a perjurer," the Supreme Court vacated Harrington's conviction and granted him a new trial. *Id.* at 524. McGhee petitioned for a new trial based on that decision.

6. After the Iowa Supreme Court's decision, then-Pottawattamie County Attorney Matthew Wilber had to decide whether to retry Harrington and whether to oppose McGhee's new-trial petition. Wilber viewed Hughes as the linchpin of the State's case because he was the only person who placed Harrington or McGhee at the crime scene. *See* Pet. App. 39a. However, Hughes had admitted under oath in 2000 that his 1978 trial testimony against Harrington and McGhee was false. McGhee CA8 App. 223-27. Wilber did not find the jailhouse informants credible. Pet. App. 39a-42a. Wilber nonetheless decided to retry respondents.

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[2] In addition, petitioners did not disclose their agreement to drop an auto-theft charge against Hughes in exchange for his testimony or the deals they made to secure the false testimony of the jailhouse informants. J.A. 61, 67; Pet. App. 37a.

In an attempt to get McGhee to implicate Harrington, Wilber lied to McGhee's lawyer. Pet. App. 41a-43a. For example, Wilber falsely told McGhee's lawyer that Gates had passed the 1977 polygraph and that his investigation had eliminated Gates as a suspect. Pet. App. 42a. Anxious to be released from prison after almost 26 years of wrongful incarceration, McGhee maintained his innocence and denied any knowledge of the Schweer murder but agreed to an *Alford* plea to second-degree murder and a sentence of 25 years with credit for time served. McGhee was released on bond on September 2, 2003, and his plea hearing was scheduled for October 24, 2003.

On October 23, 2003, with Wilber present, Hughes reaffirmed at a deposition in Harrington's case that his 1978 testimony was false. Pet. App. 44a. Wilber knew that Hughes's testimony eviscerated the case against Harrington and eliminated any factual basis for McGhee's plea. Neither McGhee nor his counsel was present for Hughes's deposition. Pet. App. 44a. The next day, with full knowledge that he lacked a case against McGhee, Wilber nonetheless offered the minutes of Hughes's 1978 testimony as the factual basis for McGhee's plea. Pet. App. 44a. A few hours after the court accepted McGhee's plea, Wilber dismissed the case against Harrington and he was released. The district court subsequently found that Wilber procured McGhee's plea through fraud. *McGhee v. Pottawattamie County*, No. 4:05-cv-00255, slip op. at 16 (S.D. Iowa Feb. 6, 2007).

7. In 2005, Harrington and McGhee brought civil-rights suits against Pottawattamie County, the city of Council Bluffs, the Council Bluffs police investigators, and given their central role during the investigative stage of the case, petitioners Richter and Hrvol. Relying on 42 U.S.C. § 1983, the complaints alleged that the defendants violated (*inter alia*) the Fourteenth Amendment by fabricating evidence against Harrington and McGhee in order to frame them and deprive them of their liberty for over 25 years. Respondents also alleged that petitioners and the other defendants conspired to deprive them of the equal protection of the laws because of their race in violation of 42 U.S.C. § 1985(3). Each complaint contained nearly 50 pages of detailed factual allegations against petitioners Richter and Hrvol and the other defendants. The cases were consolidated.[3]

After answering, petitioners moved for summary judgment on immunity grounds. Harrington submitted a detailed Statement of Additional Material Facts that Preclude Summary Judgment. J.A. 55-71. Petitioners took the trouble to quibble with three of the 77 paragraphs, admitting them "with qualification." J.A. 73-74. The remaining 74 paragraphs set out extensive evidence of egregious misconduct, and petitioners admitted them in full and without qualification.[4]

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[3] The complaints also include state-law claims that are not at issue in this Court. In addition, Wilber is a defendant in McGhee's case but not a petitioner here.

[4] The district court found these admissions binding only for purposes of the summary judgment motions whose denial is before this Court. J.A. 77-82.

Petitioners' admissions demonstrate that they engaged in extensive police-type investigative work from the earliest stages of the Schweer murder investigation. For example, petitioners admit:

> Richter and Hrvol worked side-by-side with police officers during the investigation, participating in witness interviews before any arrests were made. J.A. 57, 62-63, 73.
>
> Richter personally interviewed two witnesses (Burke and Waide) who had seen Gates walking a dog and carrying a shotgun near the murder scene. J.A. 60-63, 73.
>
> Hrvol joined police practically every time Hughes was interviewed before charges were filed. J.A. 59-60, 73.

Petitioners' admissions also reveal shocking misconduct in fabricating evidence to frame respondents. For example:

> Hughes had "no personal knowledge regarding Schweer's death—the only knowledge he received came from police and prosecutors." J.A. 64, 74.
>
> In four or five trips to the murder scene, police and prosecutors fed Hughes "the details of his testimony so he could keep his story straight." J.A. 64, 74.
>
> Hrvol told an informant to lie that McGhee had confessed in jail. J.A. 69, 74.
>
> Police and prosecutors pressured Hughes's friends—Jacobs, Pride, and Jones—to

provide false testimony to corroborate Hughes's story. J.A. 68-69, 74.

8. Taking these facts as true, the district court held that petitioners were not entitled to absolute immunity for the fabrication of evidence against respondents. *See* Pet. App. 83a. Because "any inculpatory evidence against Harrington and McGhee was plagued with inconsistencies, incompleteness, and verifiable lies," Pet. App. 81a, the court concluded that probable cause to arrest Harrington and McGhee was lacking "at all stages of the proceedings prior to trial," Pet. App. 73a. Nonetheless, the court viewed *Imbler v. Pachtman*, 424 U.S. 409 (1976), as providing petitioners with absolute immunity for misconduct after the filing of McGhee's True Information. Pet. App. 78a. Before that point, the court found that Hrvol and Richter "were acting in an investigatory capacity rather than an advocatory capacity." Pet. App. 81a. Applying the functional test for absolute immunity mandated by *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993), the court held that absolute immunity did not shield petitioners for their investigative conduct before charges were filed. Pet. App. 83a. The court further found that such misconduct "could be viewed as causatively violating the Plaintiffs' rights to a fair trial." Pet. App. 83a. Referring to the numerous undisputed statements of fact showing that petitioners and the police defendants "acted jointly with an intent to wrongfully convict the Plaintiffs for a crime they did not commit," the court held that its conclusion that petitioners lacked absolute immunity applied equally to the § 1985(3) claims. Pet. App. 90a.

The court also held that petitioners were not entitled to qualified immunity. The court first held that "the prosecutors' alleged fabrication/coercion of evidence caused the Plaintiffs' deprivation of liberty by denying them due process." Pet. App. 112a. The court further held that fabricating evidence to convict an innocent person was clearly established to be unconstitutional at the time of petitioners' misconduct, and indeed many decades earlier. Pet. App. 114a (citing, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam)).

8. On petitioners' interlocutory appeal, the Eighth Circuit affirmed in relevant part. Pet. App. 1a-20a. Because respondents challenged petitioners' conduct at the investigative stage and immunity is absolute only for distinctively prosecutorial functions, the court of appeals held that petitioners were not entitled to absolute immunity. Pet. App. 19a. The court of appeals also affirmed the district court's qualified immunity ruling. Pet. App. 19a. The court of appeals stated that "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges." Pet. App. 19a.

SUMMARY OF ARGUMENT

Petitioners engaged in truly unconscionable investigatory misconduct—abandoning their pursuit of the real suspect and framing two innocent citizens for a crime they did not commit. Petitioners are immune only if the Constitution is not offended by their horrific pre-trial misconduct

or if prosecutors, but not the police, enjoy absolute immunity for investigatory misconduct before probable cause attaches. Fortunately, neither proposition is true.

The Constitution is not indifferent to petitioners' pre-trial misconduct. When law enforcement officers fabricate evidence with an intent to use it to deprive innocent citizens of their liberty, they violate the Constitution. While that conduct will often lead to a subsequent violation of the defendant's trial rights, the Constitution is offended much earlier when investigators fabricate evidence, not to put it in a drawer, but to frame innocent citizens.

And neither the constitutional violation nor any claim to immunity depends on the job title of the state actor who engages in the investigatory misconduct. This Court has heard and rejected the argument that prosecutors are shielded by absolute immunity when they engage in investigatory functions normally performed by police officers before probable cause attaches. *See Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

Buckley also makes clear that the involvement of at least one of the petitioners in the subsequent constitutional violation of introducing the fabricated evidence at trial—an unconstitutional action shielded by absolute immunity—does not somehow wash back and launder the earlier misconduct. This proposition is both a necessary corollary of the functional approach to absolute immunity and demanded by common sense. If a police officer who dupes an unknowing prosecutor

into introducing fabricated evidence violates the Constitution, then a prosecutor who fabricates evidence before probable cause attaches and knows that he has no one left to dupe but himself is hardly less culpable or more entitled to immunity. Nor can petitioners achieve the same result by contending that the absolutely immune act breaks the chain of causation. That contention is inconsistent with *Buckley* and a host of decisions that deny absolute immunity to actions that are inextricably intertwined with actions that are absolutely immune.

Finally, considerations of sound policy demand a rejection of petitioners' claims to immunity. There is no sound reason prosecutors need greater immunity than the police when they perform traditional police work. Any notion that prosecutors face greater professional sanctions than police officers is simply wrong. And while petitioners express concerns about a flood of similar claims, one sincerely hopes that the misconduct here is far from commonplace. Neither police officers generally nor prosecutors in the Second Circuit faced a torrent of these claims, even before *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In *Iqbal*'s wake, few plaintiffs will be able to allege the kind of extreme misconduct with the type of rich detail provided in the complaints here. Moreover, while policy considerations clearly support denying absolute immunity, what ultimately matters is Congress's intent. The misconduct involved here—the framing of innocent African-American citizens for a crime they did not commit—lies at the core of what Congress sought to prevent in the Civil

Rights statutes. It is unfathomable that the Reconstruction Congress would somehow silently have provided immunity for this kind of misconduct.

ARGUMENT

This case comes to the Court on the premise that petitioners fabricated evidence against two innocent citizens in order to frame them for a murder that petitioners knew they did not commit. This constitutes the most egregious breach of public trust and resulting deprivation imaginable. The line that separates aggressive law enforcement from impermissible conduct lies several standard deviations removed from the conduct at issue here. Any student of our constitutional history would conclude that petitioners' conduct was manifestly unconstitutional and that § 1983 was enacted precisely to provide a remedy for such egregious misconduct. Petitioners suggest that this is not so.

Petitioners' startling claim rests on two propositions: (1) until probable cause attaches, the Constitution is indifferent to the deliberate framing of innocent individuals by police officers and prosecutors; and/or (2) prosecutors, but not police officers, are absolutely immune for such misconduct even though it was done in a pre-trial investigatory capacity. The first proposition is unthinkable. The second is squarely foreclosed by *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

I. FABRICATING EVIDENCE TO DEPRIVE A PERSON OF LIBERTY VIOLATES THE DUE PROCESS CLAUSE AND IS NOT SUBJECT TO ABSOLUTE IMMUNITY

Petitioners are simply wrong in contending that the Constitution is indifferent to the egregious pre-trial misconduct in this case. This Court has long held that the Due Process Clause protects citizens against misconduct that is so ill-motivated and unjustifiable as to shock the conscience. This Court has held, for example, that pumping a suspect's stomach violates the guarantee of due process. *Rochin v. California*, 342 U.S. 165, 174 (1952). Such misconduct pales in comparison to what is at issue here.[5] This Court long ago held that the deliberate use of false testimony violates the Due Process Clause. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam).[6] Petitioners and their co-defendants nonetheless conspired long before probable cause attached, despite a known suspect and knowing respondents to be innocent, to fabricate evidence to frame respondents for murder. Rather than mount a circumstantial case against the prime suspect, petitioners decided to fabricate an entirely false case against two African-American

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[5] The Solicitor General labels the conduct at issue "execrable," SG Br. 4, and "unconscionable," *id.* at 8, but concludes that it fails to shock the conscience, *id.* at 17. It is not clear how as a matter of logic or linguistics the Solicitor General can have it both ways.

[6] While the precise boundaries between substantive and procedural due process can be elusive, *compare In re Winship*, 397 U.S. 358, 362 (1970), *with id.* at 377, 382 (Black, J., dissenting); *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 435-36 (1994) (Scalia, J., concurring), the distinction is ultimately beside the point here. The pre-trial misconduct here both shocks the conscience and was designed to subvert all the procedural protections afforded suspects and defendants. It strikes at the heart of the due process guarantee.

youths from across the state line. The fabricated case, of course, was not dependent on circumstantial evidence or the product of real investigative work. Instead, an eye-witness co-perpetrator present at the crime scene was fabricated out of whole cloth. The evidence was fabricated, not to put it in a drawer and leave it there, but to use it to frame respondents and deprive them of their liberty. Petitioners' position that the Constitution permits such extraordinary misconduct and absolute immunity shields it has never been, and cannot be, the law.

A. Petitioners Fabricated Evidence Against Harrington And McGhee For The Purpose Of Depriving Them Of Their Liberty

Petitioners cannot dispute at this stage that they engaged in the unconscionable conduct. Indeed, the specific misconduct that they have admitted as undisputed for summary judgment purposes is breathtaking. *See* pp. 14-16, *supra*. Accordingly, petitioners are forced to argue that their pre-trial fabrication did not violate the Due Process Clause. Petitioners' attempt to isolate the fabrication of the evidence from its intended result—the deprivation of respondents' liberty—ignores the facts of this case and the nature of their misconduct. Richter and Hrvol did not fabricate evidence to put it "in a drawer" or "h[a]ng it on the wall" and leave it there. *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994). Fabricated evidence has little to recommend it as a wall hanging but is quite useful in framing innocent individuals, and that is precisely how it was used

here. Nor is there any doubt as to the identity of the victims of the misconduct. Petitioners fabricated evidence, not in some abstract sense, but against respondents. Petitioners pressured Hughes, not to provide information generally, but specifically to implicate Harrington and McGhee. Even after Hughes said that respondents were not capable of murder, and even after Hughes's repeated lies were revealed, petitioners stuck to their plan to use Hughes to target respondents.

Indeed, the nature of the misconduct here—the fabrication of evidence against an already-identified target—exposes hypotheticals about putting fabricated evidence "in a drawer" as utterly unrealistic. Fabrication is different from an attempt to coerce truthful information in this regard. Perhaps prosecutors or police officers could seek to coerce truthful information without intending to use that information against any particular identified individual. Fabrication of false evidence to frame someone does not work that way. The victim of the fabrication is pre-ordained.

It was not coincidence that the evidence that petitioners fabricated against Harrington and McGhee was used against them to deprive them of their liberty—that was the whole point of the fabrication. To analyze the fabrication in the abstract, as if petitioners fabricated the evidence as part of an academic exercise as opposed to as a means to frame respondents for a crime they did not commit, blinks reality, to say the least. Such an analysis also would fail to give effect to the undisputed evidence, which makes crystal clear that the fabrication was part and parcel of

petitioners' and their co-defendants' successful scheme to deprive respondents of their liberty.[7]

B. Fabrication Of Evidence In Order To Deprive A Person Of Liberty Violates The Due Process Clause Whether Or Not It Is Used At Trial

When prosecutors or police fabricate evidence against someone during an investigation with the intent to use that evidence at trial, if necessary, they violate that person's due process rights. And the violation does not depend on whether use of that fabricated evidence at trial ends up being necessary. The vast majority of criminal cases result in guilty pleas, not trials. Surely the Due Process Clause is no less offended when fabricated evidence is used to extract a guilty plea than when it is used to obtain a conviction at trial. Use at trial, therefore, is not an element of the constitutional violation, and petitioners are wrong in their repeated attempts to paint this case as being about only the use of the fabricated evidence at trial. *See, e.g.*, Pet. Br. 9, 12.

Indeed, prosecutors and police violate the Due Process Clause by fabricating evidence to frame a person even where the intended victim neither pleads guilty nor is convicted at trial. In some

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[7] Because of the nature of fabrication of evidence against an identified target, the dichotomy posited by Justice Scalia in *Buckley*—between "the mere preparation of false evidence" and "its use in a fashion that deprives someone of a fair trial or otherwise harms him"—is a false one, at least in a case like this. 509 U.S. at 281 (Scalia, J., concurring). Even if cases involving only "the mere preparation" of fabricated evidence could arise, this is not such a case.

cases, the fabrication may come to light after the intended victim is arrested but in time to save him from wrongful conviction. The discovery may limit the damage, but it does not mean the Constitution was not violated.[8] Likewise, if prosecutors or police fabricate evidence against someone in order to obtain authorization to search his home or tap his phone, the victim's rights are violated even if there ultimately is no arrest or prosecution. And if the effort to frame an innocent citizen drives the victim to suicide before trial, the victim's constitutional rights were surely violated.

Petitioners' argument that no violation occurs until conviction confuses the constitutional violation with its effect. *See* Pet. Br. 10. Intentional fabrication of evidence to frame a citizen violates the Due Process Clause, regardless of whether it results in a conviction. To be sure, if the victim is acquitted, his damages may be lower. But the Due Process Clause forbids the government from engaging in such conscience-shocking misconduct, whether or not a violation of that constitutional rule happens to cause extensive damages, minimal damages, or even no damages in a particular case. *Cf. Carey v. Piphus*, 435 U.S. 247, 266-67 (1978). Try as they might, petitioners cannot render the Constitution indifferent to the

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[8] An important, but frightening, consequence of both petitioners' and the Solicitor General's theory is that a police officer who fabricates evidence to frame a defendant, but fails in his effort to dupe a prosecutor into introducing it, neither violates the Constitution nor could be prosecuted under 18 U.S.C. § 242 (nor could a single officer be prosecuted under 18 U.S.C. § 241).

pre-trial misconduct here unless and until it produces a conviction. Of course, the tragic facts of this case are that the fabrication was not exposed until after respondents had been convicted and suffered 25 years of wrongful imprisonment. But those facts should not obscure the reality that petitioners violated respondents' due process rights long before trial or conviction when petitioners fabricated evidence against respondents with the intent to deprive them of their liberty.

By invoking the harmless-error doctrine, *see* Pet. Br. 10, petitioners unwittingly underscore the fundamental distinction between the substantive constitutional rule and the effect of a violation of that rule in a given case. The harmless-error doctrine does not enshrine the notion that there is no constitutional violation at all in the absence of prejudicial effect, or more colloquially, "no harm, no foul." To the contrary, the question whether an error is harmless arises only if there has been a constitutional violation. *See, e.g., United States v. Andreas*, 216 F.3d 645, 675-76 (7th Cir. 2000). To say that a conviction can be sustained under the harmless-error doctrine notwithstanding the use of fabricated evidence is to presuppose that the use of the fabricated evidence violated the Constitution.

It is not surprising that petitioners shy away from the argument that the Due Process Clause permits a government official to fabricate evidence against a person in order to deprive him of liberty. It is difficult to imagine that a constitutional line is not crossed the moment that investigators shift their focus from solving a crime to framing an

innocent citizen. Yet that is the burden of petitioners' argument.

C. Fabrication Of Evidence To Deprive A Person Of Liberty Violates The Due Process Clause And Is Not Protected By Absolute Immunity, Whether Done By Police Or Prosecutors Performing Police Functions

Petitioners do not dispute that a police officer who fabricates evidence that causes a deprivation of liberty violates the Due Process Clause. *See* Pet. Br. 14-15. The Solicitor General expressly concedes that "police officers who fabricate evidence may be held liable under Section 1983." SG Br. 6. But the question whether due process is offended—as opposed to the question of immunity—does not turn on the job title of the perpetrator. The due process violation inheres in the arbitrary, unjustifiable, and liberty-imperiling nature of the government official's conduct, not his job title. For purposes of the constitutional violation, fabrication of evidence by a prosecutor is no less abhorrent than fabrication by a police officer. And this Court has already considered and rejected the argument that immunity turns on the job title of the perpetrator as opposed to the function performed. *See Kalina v. Fletcher*, 522 U.S. 118, 127 (1997); *Buckley*, 509 U.S. at 273-76. When the prosecutor performs police-type investigative functions, the prosecutor no less than the police officer enjoys only qualified immunity. *See Buckley*, 509 U.S. at 276. Thus petitioners stand or fall with the police officers with whom they worked side-by-side and conspired. All are liable; none is immune.

1. Police officers who fabricate evidence and deliver it to a prosecutor for use at trial violate the Due Process Clause. *See Pyle v. Kansas*, 317 U.S. 213, 216 (1942). As the First Circuit has explained, the proposition that a citizen has the "right not to be framed by the government" is "easy pickings." *Limone v. Condon*, 372 F.3d 39, 44 (1st Cir. 2004). "[I]ndeed," the court emphasized, "we are unsure what due process entails if not protection against deliberate framing under color of official sanction." *Id.* at 45. Other courts have agreed that fabrication of evidence that results in a deprivation of liberty violates due process. *See, e.g., Washington v. Wilmore*, 407 F.3d 274, 282-83 (4th Cir. 2005); *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc); *Wilson v. Lawrence County*, 260 F.3d 946, 954 (8th Cir. 2001); *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997); *Riley v. City of Montgomery*, 104 F.3d 1247, 1253 (11th Cir. 1997).

Nothing in the due process analysis turns on the job title of the state actor who violates a citizen's "right not to be framed by the government," *Limone*, 372 F.3d at 44. The conduct, not the identity of the state actor, drives the constitutional analysis. And the conduct here is repugnant to the Constitution whether committed by a prosecutor or a police officer.

2. a. It is absolutely clear that investigating police officers who fabricate evidence that results in a deprivation of liberty have no claim to absolute immunity. *See, e.g., Castellano v. Fragozo*, 352 F.3d 939, 958 (5th Cir. 2003) (en banc); *Jones v. Cannon*, 174 F.3d 1271, 1289 (11th Cir. 1999).

Because immunity law focuses on the function performed by police officers in investigating, and it is the fabrication during investigation that violates the Constitution, officers are covered only by qualified immunity for investigative conduct. *Jones*, 174 F.3d at 1289. This is so even if the officer intends the fabricated evidence to be elicited by prosecutors at trial through advocacy conduct that is covered by absolute immunity when viewed in isolation. *See Gregory v. City of Louisville*, 444 F.3d 725, 738 (6th Cir. 2006).[9]

Because it is hardly a novel proposition that fabricating evidence to frame someone and deprive him of liberty is unconstitutional, police officers who fabricate evidence are unsuccessful when they claim qualified immunity. As the First Circuit put it in *Limone*: "We conclude, without serious question, that *Mooney* and its pre-1967 progeny provided reasonable law enforcement officers fair warning that framing innocent persons would violate the constitutional rights of the falsely accused." 372 F.3d at 48. This is not an area where reasonable minds could differ or where law enforcement needs some breathing room or margin for error. The conduct is anathematic and

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[9] Similarly, a police officer who fabricates evidence intending that it be elicited at trial through a witness is liable for the fabrication even though the witness is absolutely immune for his testimony under *Briscoe v. LaHue*, 460 U.S. 325 (1983). *See Washington*, 407 F.3d at 283. The law recognizes that the officer's fabrication causes a compensable constitutional injury, notwithstanding subsequent conduct by others in the chain of causation protected by absolute immunity. *See* pp. 44-45, *infra*; *cf. Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986).

obviously so. The same principles apply to prosecutors who fabricate evidence to frame innocent citizens while purporting to investigate the crime. If anything, the warning signs ought to be all the more unmistakable to the prosecutor.

b. This Court's cases make it abundantly clear that prosecutors, like police officers, are eligible only for qualified immunity when they engage in unconstitutional conduct during the investigative phase of the criminal process. Even before *Buckley*, this Court had repeatedly emphasized its functional approach to absolute immunity, which focuses on "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988); *accord Burns v. Reed*, 500 U.S. 478, 486 (1991); *Briscoe*, 460 U.S. at 342. If there were any lingering notion that a prosecutor might enjoy absolute immunity for conduct within the broadest conception of his job duties simply by virtue of being a prosecutor, this Court's decision in *Buckley* dispelled it. The Court in *Buckley* considered at length the prosecutors' performance of "the investigative functions normally performed by a detective or police officer," 509 U.S. at 273, and it held that the function being performed was dispositive: "When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same." *Id.* at 276.

Unlike some of their amici, *see* Nat'l Ass'n of Counties Br. 28-33, petitioners do not ask the Court

to overrule *Buckley*.[10] But *Buckley* stands as an insuperable obstacle to their absolute immunity argument. *Buckley* leaves open Justice Scalia's argument that the Constitution is not violated unless and until the fabricated evidence is used at trial (an argument that is wrong, *see* pp. 22-27, *supra*, and appears to rest on a view of due process not shared by the Court as a whole). *See* 509 U.S. at 281-82 (Scalia, J., concurring). But it does not leave open the argument that the investigative conduct is absolutely immune. Indeed, that was the whole point of Justice Scalia's concurrence. *See id.* at 279-80.

Accordingly, overruling *Buckley* is the only way to confer absolute immunity on petitioners for their investigative conduct. Rather than candidly shouldering the burden of asking for *Buckley* to be overruled, petitioners take liberties with the Court's opinion. Petitioners observe that the Court recognized that a prosecutor's absolutely immune advocacy conduct may include "actions preliminary to the initiation of a prosecution and actions apart from the courtroom," Pet. Br. 24 (quoting *Buckley*, 509 U.S. at 272), and petitioners argue that this principle entitles them to absolute immunity for what they euphemistically term their "pre-trial acts," Pet. Br. 20 (capitalization omitted). But petitioners ignore that in the next paragraph of its opinion, the Court emphatically rejected the notion

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[10] Petitioners' choice is prudent. Even Justices who have questioned the Court's functional approach have recognized that it is so "deeply embedded" that it merits adherence as a matter of stare decisis. *See Kalina*, 522 U.S. at 135 (Scalia, J., concurring).

that absolute immunity extends as far as a prosecutor's performance of ordinary police-type investigative work:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.

509 U.S. at 273. Petitioners also ignore the Court's explicit holding that absolutely immune advocacy conduct does not begin until a prosecutor has probable cause for arrest. *See id.* at 274. Based on the admitted facts, petitioners engaged in extensive ordinary police-type investigation and fabricated evidence against respondents long before probable cause attached.

Indeed, the misconduct here is much more clearly investigative and pre-probable-cause than the conduct in *Buckley*. While some cases involve more difficult line-drawing, *see Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part), petitioners here performed classic police work—*e.g.*, interviewing witnesses, canvassing the neighborhood for leads—and did so in the immediate wake of the crime and long before petitioners could plausibly be said to be preparing for judicial proceedings. *See* J.A. 56-62. Richter, no doubt aware of the importance of solving the crime to his election effort, was involved in the investigation from the outset. And Hrvol worked alongside police officers long before he was

assigned the case for prosecution purposes. *See* pp. 1-9, *supra*. This is presumably why petitioners conceded in their petition for certiorari that they "were functioning as investigators at the time they allegedly procured false testimony against respondents; accordingly, only qualified immunity applied." Pet. 19. In sum, their claim to absolute immunity cannot be reconciled with *Buckley*.

3. For the foregoing reasons, it is clear that a prosecutor is subject to liability under § 1983 if he fabricates evidence to frame an innocent citizen and hands that evidence over to a colleague who uses it at trial. The fabricating prosecutor is not entitled to absolute immunity, because he engages in no advocacy conduct directly related to the fabricated evidence. And his fabrication, no less than a police officer's, violates the Due Process Clause because it causes an intended or at least foreseeable deprivation of liberty. The fabricating prosecutor is liable regardless of whether he deceives the trial prosecutor into using the phony evidence, coerces the trial prosecutor into using it, or conspires with the trial prosecutor to use it, because in all those scenarios, his fabrication is a cause of the deprivation of liberty. *See Malley*, 475 U.S. at 344 n.7 (magistrate's issuance of warrant does not protect officer from liability for applying for unreasonable warrant, because § 1983 makes officer "responsible for the natural consequences of his actions") (internal quotation marks omitted). The Solicitor General concedes as much. *See* SG Br. 25 n.6.[11] Specifically, the Solicitor General

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[11] The Solicitor General's extended detour into the common law's treatment of malicious prosecution, *see* SG Br.

agrees that "on facts like those alleged here, a person who bears the title prosecutor, but who 'perform[ed] [only] the investigative functions normally performed by a detective or police officer,' *Buckley*, 509 U.S. at 273, would be liable." SG Br. 7

22-31, is puzzling. Although the Court may look to the common law "when [thinking] about elements of actions for constitutional violations . . . the common law is best understood here more as a source of inspired examples than of prefabricated components of [constitutional] torts." *Hartman v. Moore*, 547 U.S. 250, 258 (2006) (citation omitted). In any event, nothing in the long excursion provides any support for the notion that prosecutors could not be subject to liability for "procurement." Indeed, the Solicitor General is forced to admit that the common law permitted claims of "conspiracy between officer and prosecutor" to fabricate evidence. SG Br. 25 n.6. Moreover, the point of this exercise seems to be to establish that procurement liability is a species of "vicarious" liability. SG Br. 24, 29. But that is wrong. Procurement liability is not vicarious liability, but rather a species of inchoate liability. *See Pinkerton v. United States*, 328 U.S. 640, 647 (1946). The difference fatally undermines the government's argument that the Constitution is not violated by the fabrication but rather only by the "primary" violation at trial, since inchoate liability does not depend on the later violation. Moreover, the fact that procurement liability is a form of inchoate—and not vicarious—liability explains why a police officer who dupes an innocent prosecutor into presenting fabricated evidence is liable, even though the prosecutor's trial conduct is innocent. The police officer cannot be "vicariously" liable for the prosecutor's conduct, because the prosecutor's conduct is not wrongful. *See, e.g., Doe v. Cunningham*, 30 F.3d 879, 884 (7th Cir. 1994) ("Cunningham and Birgans were not negligent. The Province therefore has nothing to be vicariously liable for based on [their] actions."). Instead, the police officer is liable because he violated the Constitution by fabricating evidence to frame the defendant, even if that violation was inchoate.

(alterations in original). That concession describes petitioner Richter, who fabricated evidence against respondents during the investigative phase but who did not have any direct role in presenting that evidence at respondents' trials. Richter therefore is indistinguishable from a police officer for purposes of liability.[12]

In the end, Hrvol fares no better than Richter. Neither the existence of a due process violation nor the absolute immunity question turns on the identity of the person who ultimately introduced the fabricated evidence at trial. There is no special rule that a prosecutor who fabricates evidence to frame an innocent citizen can grant himself absolute immunity if, but only if, he takes the further unconstitutional step of introducing the fabricated evidence at trial.

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[12] Indeed, petitioners' own statement of the question presented effectively excludes Richter. It asks whether a prosecutor may be sued where he "procur[ed] false testimony during the criminal investigation, *and then . . . introduced that same testimony against the defendant at trial.*" Pet. Br. i (emphasis added). Richter did not present any of the fabricated evidence; Hrvol did so at both trials. Richter did not participate in Harrington's trial. At McGhee's trial, Richter examined two secondary witnesses for the State (the medical examiner and Schweer's widow) and cross-examined McGhee's girlfriend. This difference between Richter and Hrvol was not a focus of the proceedings below, but that is a function of the arguments that petitioners made and preserved below. They did not offer a causation argument that turned on the precise role of the prosecutors at the trials. Instead, they offered a broad claim of absolute immunity that the Eighth Circuit correctly rejected as incompatible with *Buckley*.

As a matter of both constitutional law and logic, a later constitutional violation—even one shielded by absolute immunity—compounds the earlier violation. It does not erase it. *See Gregory*, 444 F.3d at 739 ("Merely because a state actor compounds a constitutional wrong with another wrong which benefits from immunity is no reason to insulate the first constitutional wrong from actions for redress."). As a matter of absolute immunity doctrine, if particular conduct is not shielded by absolute immunity when it occurs, subsequent conduct involving a distinct function protected by absolute immunity does not transform the earlier conduct. The latter, distinct actions do not wash back and immunize the earlier conduct involving a different function. *Buckley* so held: the prosecutors' non-advocacy work remained non-advocacy work and protected only by qualified immunity even after the prosecutors later convened a grand jury and performed an advocacy function. "A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial." 509 U.S. at 276.

Apart from its illogic and incompatibility with this Court's precedents, the prospect that an official could immunize himself by committing a second constitutional violation would create dangerous incentives. Where a prosecutor who fabricates evidence "hands it to an unsuspecting prosecutor," it is possible that the innocent prosecutor will discover the fabrication and abort the unlawful

plan. *See Zahrey v. Coffey*, 221 F.3d 342, 353 (2d Cir. 2000). In contrast, where the fabricator "enlists himself," as Hrvol did here, that chance of exposure does not exist and the victim is at even greater risk. *See id.* Judge Newman was thus correct that "[i]t would be a perverse doctrine of tort and constitutional law" that would hold the prosecutor liable in the former case but not the latter. *Id.*; *see also* Pet. App. 18a. The law should not *encourage* a prosecutor who fabricates evidence to follow through and use that evidence himself at trial.

The courts that have confronted the question directly have unsurprisingly rejected such a conception of immunity as antithetical to the rule of law. In *Thomas v. Sams*, 734 F.2d 185, *reh'g denied*, 741 F.2d 783 (5th Cir. 1984), for example, Sams was the mayor of a city as well as its magistrate. He signed a criminal complaint as mayor and then, as magistrate, issued an arrest warrant "based on the complaint that he had himself just signed." 734 F.2d at 188. Sams argued that he could not be sued for signing the complaint without probable cause because he had absolute judicial immunity for issuing the arrest warrant. The Fifth Circuit held that Sams could not "i[n]oculate" his non-immune conduct by "ak[ing] up his magistrate's pen." *Id.* at 191. Similarly, in *Gregory*, the Sixth Circuit held that the defendants' trial testimony, though itself covered by absolute immunity, could not "relate backwards" to immunize their fabrication of evidence during the investigative stage. 444 F.3d at 738; *see also id.* at 739 ("This Court has never

endorsed such a self-serving result."); *Spurlock v. Satterfield*, 167 F.3d 995, 1004 (6th Cir. 1999) (rejecting "the untenable result that officials who fabricate evidence . . . could later shield themselves from liability simply by presenting false testimony regarding that evidence").

II. USE OF FABRICATED EVIDENCE AT TRIAL DOES NOT IMMUNIZE EARLIER MISCONDUCT OR BREAK THE CHAIN OF LIABILITY

A. Absolute Immunity Does Not Make A Prosecutor's Conduct Constitutional Or Privileged

Absolute immunity determines whether a civil damages remedy is available against a prosecutor for a particular act. Because absolute immunity does not determine (or, unlike qualified immunity, even directly relate to) whether conduct is constitutional, a prosecutor's act may be unconstitutional and may form part of an unconstitutional conspiracy even if the act itself is covered by absolute immunity. *See Briscoe*, 460 U.S. at 341 n.26. That the overall conspiracy involved an absolutely immune act, therefore, does not alter the reality that both the conduct that preceded the absolutely immune act and the absolutely immune act itself violated the Constitution. *See Dennis v. Sparks*, 449 U.S. 24, 28 (1980) (although judge was immune, "[i]mmunity does not change the character of the judge's action or that of his co-conspirators").

Nor does absolute immunity confer use immunity; it does not prevent evidence of the

absolutely immune and unconstitutional act from being introduced at trial. Absolute prosecutorial immunity is a limitation on damages and certain civil actions, not an evidentiary privilege. Absolute immunity is quite different from Speech or Debate Clause immunity in this regard. *See id.* at 30. Although absolute immunity protects against both damages and standing trial, it protects against standing trial as a defendant, not against testifying, and it certainly does not render the facts surrounding the unconstitutional, but immune, conduct inadmissible. Petitioners thus vastly exaggerate the role of absolute immunity in asserting that "the fact and consequences of any use that petitioners made of allegedly false testimony at respondents' criminal trials could not properly be an issue—indeed, it could not properly be discussed or entered into evidence—in the [present case]." Pet. 15. Not surprisingly, no citation follows this assertion, and it is foreclosed by, *inter alia*, this Court's decision in *Dennis*.

In *Dennis*, a state judge and private parties allegedly conspired to stop production from an oil lease by having the judge enter an injunction in exchange for a bribe. 449 U.S. at 25-26. The private-party co-conspirators argued that the judge's absolute immunity for issuing the injunction meant that the case could not be brought against them either, because allowing litigation of claims of judicial corruption would "seriously erode[]" the judge's immunity. *Id.* at 29. This Court disagreed, holding that the judge's immunity from civil damages suit did not give him a privilege against testifying about his immune conduct or bar

litigation against other parties for the conspiracy. *See id.* at 30-31. Judicial immunity is "comparatively sweeping," *Forrester*, 484 U.S. at 225, shielding all judicial actions except those taken in the complete absence of jurisdiction, *see Mireles v. Waco*, 502 U.S. 9, 12 (1991) (per curiam). "But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability." *Dennis*, 449 U.S. at 31. *A fortiori*, the far narrower doctrine of prosecutorial immunity under the function test does not preclude respondents' claims just because petitioners' conspiracy included some acts that, viewed in isolation, are absolutely immune.

B. The Vast Majority Of Petitioners' Unconstitutional Course Of Conduct Is Not Covered By Absolute Immunity

Respondents pleaded in great detail a conspiracy to fabricate evidence to deprive them of their liberty. *See* pp. 4-10, *supra*. Respondents' facts are drawn from police reports, deposition transcripts (including depositions of petitioners and co-defendants), and other objective evidence that demonstrates the existence of the conspiracy and petitioners' participation in it. *See* J.A. 55-74. The conspiracy that respondents proved without dispute on summary judgment includes extensive conduct that is not covered by absolute immunity and would shock the most jaded of consciences. In particular, petitioners conspired with detectives to use Hughes as a mouthpiece to fabricate evidence against respondents. *See* J.A. 59-70, 73-74. The conspirators knew that Hughes had lied repeatedly in his attempts to tell a story they liked; indeed,

they knew that Hughes was incapable of telling a truthful story about the murder because he lacked any personal knowledge about it. *See* J.A. 63. The conspirators fed Hughes the information that they wanted him to repeat, and, with coaching, Hughes eventually learned to repeat it. *See* J.A. 64. Under *Buckley*, as petitioners admitted in their petition, they "were functioning as investigators at the time they allegedly procured false testimony against respondents; accordingly, only qualified immunity applied." Pet. 19; *see also* Pet. App. 73a, 78a.

Petitioners' repeated attempts to portray this case as exclusively about respondents' trials, *see, e.g.*, Pet. Br. 5-6, simply disregard all this evidence. When respondents engaged in the investigative activity described above, they did not have absolute immunity; they had not yet engaged in any advocacy functions "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Petitioners thus get it backwards in accusing the courts below of allowing their "conduct *before* trial [to] prospectively vitiate[] their absolute immunity *at* trial." Pet. Br. 6; *see also id.* at 22. In reality, petitioners are asking this Court to allow their conduct at trial to retrospectively immunize their investigative conduct that was not absolutely immune when it occurred. That is precisely what *Buckley* rejected, *see* 509 U.S. at 276, which explains petitioners' (correct) concession in their petition.[13]

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[13] Petitioners now argue that their fabrication of evidence during the investigative stage was absolutely immune because it was "directly connected" with respondents' trials.

In short, this case involves extensive conduct by petitioners that is not covered by absolute immunity under *Buckley*'s clear rule. The existence of such substantial non-absolutely-immune conduct belies petitioners' and their amici's protestations that the decision below renders prosecutorial immunity "meaningless" because all a plaintiff has to do is to "plead[] that [the prosecutor] was somehow involved in a pre-trial investigation." SG Br. 7; *see also, e.g.*, Pet. Br. 33. Respondents have done far more than merely plead that petitioners were "somehow involved in a pre-trial investigation." It took 25 years for the facts to come out and petitioners' conspiracy to unravel, but unravel it did. Respondents pleaded dozens of pages of detailed facts to support their claims that petitioners performed police-type investigative functions and were at the heart of the decision to stop searching for the true killer and to start framing innocent citizens. *See* Harrington Compl.

Pet. Br. 23 (quoting *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009)). This argument is wholly without merit. First, this argument squarely contradicts (without so much as acknowledging) petitioners' concession in the petition that they were functioning as investigators when the alleged fabrication occurred, and it should be dismissed for that reason alone. Second, this argument squarely conflicts with *Buckley*'s holdings that (1) a prosecutor's investigative activities prior to probable cause are not covered by absolute immunity, *see* 509 U.S. 274-75 & n.5, and (2) retroactively describing investigative work as preparation for trial cannot change that result, *see id.* at 276; *see also Burns*, 500 U.S. at 495. Petitioners do not suggest that *Van de Kamp* overruled *Buckley* on these points, nor could they given that *Van de Kamp* cited *Buckley* with approval and did not even involve investigative work by a prosecutor. *See* 129 S. Ct. at 861.

5-47; McGhee Compl. 3-34. This is emphatically not a case where a plaintiff tries to use a thin pleading of a sliver of non-immune activity to circumvent *Imbler*, and the Court does not need to decide whether such a case could proceed. *See* pp. 50-53, *infra*.[14]

C. Subsequent Absolutely Immune Acts Do Not Break The Chain Of Liability Arising From Earlier, Non-Immune Acts

1. This Court need not address the question of causation separately. It is enough to reject petitioners' twin contentions that the Constitution is indifferent to their pre-trial misconduct and that they enjoy absolute immunity despite *Buckley*. Indeed, typically this Court has not addressed causation separately in its absolute immunity cases. *See* pp. 45-48, *infra*. Nonetheless, the presence in a course of unconstitutional conduct of

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[14] Because this case is in this Court on petitioners' interlocutory appeal from the denial of absolute immunity, issues of damages have not yet been litigated and this Court need not decide the proper measure of damages for petitioners' fabrication of evidence during the investigative phase. *Cf. Peña v. Mattox*, 84 F.3d 894, 897 (7th Cir. 1996) (Posner, J.) ("A prosecutor has no immunity for the acts that he does outside his role as a prosecutor; and the law of conspiracy would impute to him, as a coconspirator, the acts of the other, nonprosecutor members of the conspiracy.") (citation omitted). Unless the Court decides that neither police officers nor prosecutors have any liability for this kind of misconduct, courts will eventually have to confront the damages issues. Once they do, and if a concrete difference in approach emerges, the issue will be ripe for this Court's consideration.

an absolutely immune act does not, as a matter of law, break the chain of liability or preclude damages proximately caused by earlier, non-immune acts whose intent and natural consequence were to cause those damages. This Court so held in *Malley*, where it addressed whether a magistrate's decision to issue a warrant "breaks the causal chain between the [officer's] application for the warrant and the improvident arrest." 475 U.S. at 344 n.7. The magistrate's issuance of the warrant was an absolutely immune judicial act, and that act was a but-for cause of the arrest, but this Court rejected a "no causation" argument as "inconsistent with our interpretation of § 1983" making a person "responsible for the natural consequences of his actions." *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

Similarly, if an officer fabricates evidence and later presents that evidence as a witness at trial, the officer can be liable for the fabrication even though his testimony is itself immune under *Briscoe*. *See, e.g.*, *Spurlock*, 167 F.3d at 1004. And an officer who fabricates evidence and delivers it to a prosecutor for use at trial can be liable even though the prosecutor's use of the evidence at trial is itself absolutely immune advocacy under *Buckley*. *See Washington*, 407 F.3d at 283-84. Moreover, *Dennis* suggests, though it does not hold, that other state actors are liable for a bribery conspiracy even though the bribed judge's act of entering an injunction is absolutely immune. In all these scenarios, conduct that is absolutely immune intervenes between the earlier, non-immune conduct and the injury, but the absolutely immune

conduct does not necessarily sever the chain of liability arising from the earlier conduct. So too here, petitioners' fabrication of evidence gives rise to liability in part because its natural and intended consequence was to deprive respondents of liberty, and liability is not defeated by the subsequent intervention of absolutely immune conduct. "The intervention of a subsequent immunized act by the same officer does not break the chain of causation necessary for liability." *Michaels v. McGrath*, 531 U.S. 1118, 1118 (2001) (Thomas, J., dissenting from denial of certiorari); *see also Carver v. Foerster*, 102 F.3d 96, 101 (3d Cir. 1996) ("An unconstitutional or illegal course of conduct by county government does not fall within the doctrine of absolute immunity merely because it is connected to or followed by a vote of a county board.").

2. This Court's prosecutorial immunity cases, unlike *Malley*, have not expressly addressed this causation question directly. But there is no logical or doctrinal reason why a different analysis should apply merely because the subsequent act is absolutely immune as a prosecutorial act rather than a judicial act. Indeed, this Court's prosecutorial immunity cases appear to rest on the implicit premise that the *Malley* analysis applies in this context as well. Otherwise, the decisions make little sense. In *Burns* and *Kalina*, the Court took great care to isolate the particular acts to which absolute immunity applied while expressly holding that other closely-related acts did not trigger absolute immunity. If the presence of a subsequent absolutely immune act precluded liability as a matter of law, the Court's meticulous parsing of the

prosecutors' conduct was little more than a fool's errand.

In *Burns*, for example, the Court considered a prosecutor's legal advice about the permissibility of using hypnosis to elicit a statement from a witness and the prosecutor's later appearance in a probable-cause hearing to obtain a warrant based on testimony elicited while the witness was hypnotized. Despite the obvious relationship between the two activities, the Court analyzed them separately and focused, not on their relationship to each other, but on the relationship of each to the judicial process. *See* 500 U.S. at 487-96. And the Court ultimately held that absolute immunity shielded the prosecutor's appearance at the probable-cause hearing but not his legal advice to the police. *See id.* at 492, 495-96. Obviously, the cause of the real damage in *Burns* flowed from the use of the evidence to obtain the warrant. Nonetheless, the Court viewed the acts separately and remanded the case to allow it to proceed based on the non-absolutely-immune conduct.

The prosecutor's acts at issue in *Kalina* were, if anything, even more closely related, but the Court once again analyzed them separately and reached varying immunity conclusions. The Court held that a prosecutor was entitled to absolute immunity for filing two charging documents that were based on an inaccurate supporting certification. 522 U.S. at 129. The Court then held that the prosecutor was not absolutely immune for executing the inaccurate certification itself. *Id.* at 129-31. The prosecutor argued that "the execution of the certificate was just one incident in a presentation that, *viewed as a*

whole, was the work of an advocate and was integral to the initiation of the prosecution." *Id.* at 130 (emphasis added). The Court, however, refused to view the three documents, which had been filed together, as an integrated whole. *See id.* It is hard to imagine that the plaintiff suffered any injury from the certification separate and apart from its use to support the charging documents. The certification served no independent purpose. Yet the Court analyzed each of the documents separately and allowed the claims based on the non-absolutely-immune conduct to go forward.

If there were a legal rule that the presence of an absolutely immune act in the chain of causation precluded liability for non-immune acts, the distinctions drawn in these cases would have been pointless. In *Burns*, the Court could have avoided analyzing the prosecutor's legal advice because it caused no independent injury and his subsequent absolutely immune activity in appearing at the probable-cause hearing seemingly would have broken the chain of liability. Likewise, in *Kalina*, there would have been no reason to parse the prosecutor's filing into three separate documents, because the certification could not have caused any injury independent of the absolutely-immune charging documents. The consistent, clear mode of analysis that this Court has employed in prosecutorial immunity cases makes sense only if *Malley* applies.

A rule that a subsequent absolutely immune act breaks the chain of liability arising from earlier, non-immune acts also would render holdings outside of the prosecutorial immunity context

nothing more than hollow shells. *Dennis*, for example, would fall victim. In *Dennis*, even though the conspiracy culminated in the judge's issuance of an injunction—an absolutely immune act—the Court carefully analyzed the potential liability of the judge's co-conspirators and whether the judge could testify about his immune act. 449 U.S. at 28-31. None of that would have mattered if the judicial act precluded liability for the private co-conspirators who sought it.

3. Such a rule also would improperly expand absolute prosecutorial immunity, as a practical matter, far beyond the bounds this Court has set for it. It would essentially render the functional approach to absolute immunity a dead letter and belie the Court's admonition that later absolutely immune acts do not wash back and launder earlier unprotected misconduct. A prosecutor's typical course of conduct will include an absolutely immune act—*e.g.*, filing charging documents, *Kalina*, 522 U.S. at 129; appearing before a grand jury; appearing at a probable-cause hearing, *Burns*, 500 U.S. at 492; or appearing at trial. If the absolute immunity that applies to those advocacy activities barred suit as a matter of law for the prosecutor's earlier activities, that would effectively immunize investigative conduct that this Court has held is not covered by absolute immunity. *See Zahrey*, 221 F.3d at 353 n.10 ("Deeming the chain of proximate causation broken by the prosecutor's use of evidence he himself fabricated would also, in practical effect, enlarge the scope of the prosecutor's absolute immunity."). Absolute immunity would be neither "quite sparing" nor

meaningfully governed by the functional test. *See Buckley*, 509 U.S. at 269.

III. APPROPRIATELY LIMITED LIABILITY WILL NOT HARM THE JUDICIAL PROCESS AND IS NECESSARY TO AVOID LEAVING PROSECUTORS FREE TO FABRICATE EVIDENCE WITH PRACTICAL IMPUNITY

Petitioners' fabrication of evidence to deprive respondents of their liberty is egregious, exceptional, and remarkably well-documented. The strict limits that this Court already has placed on suits against prosecutors—from absolute immunity for advocacy conduct, to the strict pleading requirements of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), to the substantive and procedural protections of qualified immunity—will ensure that prosecutors and courts are not burdened by a flood of insubstantial cases. Petitioners' amici are wrong to contend that allowing this case to proceed will "distort[] . . . the prosecutorial function and the administration of justice." Br. of Colorado, et al. at 15. The misconduct at issue here has nothing to do with the proper administration of justice. It is the antithesis of that. To bar any possibility of redress for fabrication of evidence to frame innocent African-Americans would distort Congress's intent in enacting § 1983 and imperil the administration of justice by establishing a regime of practical impunity. For with respect to the supposed alternative means of ensuring that prosecutors do not commit such misconduct and are punished when they do, *see generally* Br. of Nat'l Ass'n of AUSAs, this case is unfortunately not exceptional

at all: petitioners have suffered no consequences for their misconduct and face no prospect of any consequences, save for this lawsuit.

A. There Is No Reason To Fear A Flood Of Claims Against Prosecutors

In light of the extraordinary and conscience-shocking conduct at issue here, petitioners' floodgates concerns were vastly overstated even before *Iqbal*. After *Iqbal*, the concerns are wholly misplaced.

Petitioners' misconduct was truly extreme. Petitioners did not merely rely on Hughes despite doubts about his truthfulness. Having established Hughes's willingness to lie, petitioners and their co-conspirators repeatedly took him to the crime scene and fed him a false story until he could repeat it. J.A. 63-64, 74. Petitioners did not merely choose to believe a factually debatable version of events or decide to proceed despite "a sharp conflict in the evidence." *Imbler*, 424 U.S. at 426 n.24. They used Hughes to manufacture new events that never occurred. J.A. 64, 74. Nor did they stop there. They disregarded evidence that pointed to the actual, not fabricated, suspect, and worked overtime to fabricate corroborating testimony for Hughes's concocted eye-witness account. This case is about actual fabrication of false evidence, the framing of innocent citizens while disregarding real evidence of real suspects, not "fabrication" used loosely, for example, to refer to shopping for a favorable expert, *see Buckley v. Fitzsimmons*, 919 F.2d 1230, 1236 (7th Cir. 1990). Because the admitted facts in this case are so extreme,

acknowledging that petitioners may be held liable will not unleash a flood of claims against prosecutors.

One deterrent against too-easy resort to claims against prosecutors is the strict approach to pleading that this Court adopted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and recently reaffirmed in *Iqbal*. Even before those cases, the extreme, repeated misconduct here is not the kind of easy-to-allege but hard-to-disprove misconduct that generated concerns about undermining immunity. But *Iqbal* and *Twombly* remove such concerns altogether. Now that it is clear that "naked assertion[s]' devoid of 'further factual enhancement'" need not be taken as true, *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557), many claims of constitutional violations by prosecutors will be dismissed for failure to provide adequate factual detail. And now that it is clear that even well-pleaded factual allegations do not suffice unless they allege a "plausible" violation, many claims will be dismissed on the ground that it is "unrealistic" or implausible to believe that the prosecutors truly committed the misconduct alleged. *See id.* at 1950-51. Petitioners' suggestion that "a mere allegation" of non-absolutely-immune conduct will ensnare prosecutors in "vexatious litigation," Pet. Br. 33, simply ignores *Iqbal* and the content of the complaints here. Most would-be plaintiffs will be unable to allege dozens of pages of detailed facts, as respondents did.

Qualified immunity, which has always been deemed sufficient for police officers, will ensure

that prosecutors are neither cowed into inappropriate timidity nor distracted by burdensome litigation. First, by barring suit unless the prosecutor violated a constitutional rule that was clearly established in the circumstances, qualified immunity ensures that only clear-cut cases go forward. Outright fabrication of evidence has long been clearly unconstitutional, but lesser variants of misconduct may not rise, or perhaps more accurately sink, to the conscience-shocking level or at least may not clearly have done so at the time of the conduct or under the particular circumstances at issue. *See, e.g.*, *Devereaux*, 263 F.3d at 1077, 1082 (stating that "[t]he investigatory behavior of which Devereaux complains is indeed troubling, and we do not condone it," but rejecting due process claim because using questionable interview techniques in child sex-abuse investigation is one thing and "intentionally fabricating false evidence is quite another").

Iqbal reinforces this protection by requiring courts to focus on the substance of the alleged facts rather than a complaint's labels or conclusions. While a broad label could capture misconduct on both sides of the clearly established line, the specific misconduct alleged here blatantly crosses constitutional lines that have long been clear. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law," *Malley*, 475 U.S. at 341, and little can be said in favor of protecting the latter. *See Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("We do not believe that the security of the Republic will be threatened if its Attorney General

is given incentives to abide by clearly established law.").

Second, qualified immunity's procedural protections minimize the burden of civil-rights litigation. If a prosecutor's motion to dismiss is denied, he can take an immediate appeal, and he is not subject to discovery in the meantime. *See Iqbal*, 129 S. Ct. at 1953-54. In fact, the difference between the merits-linked approach of qualified immunity and the functional test for absolute immunity means that qualified immunity provides even greater protection from entanglement in litigation until the immunity issue is resolved. As noted, a prosecutor relying on qualified immunity to move to dismiss can avoid discovery unless the court of appeals rules that the complaint states a clearly-established violation. Because the functional test for absolute immunity, in contrast, is not tied to the merits of the claim, the court of appeals lacks jurisdiction on interlocutory appeal to consider whether a valid constitutional claim has been stated. *See Paine v. City of Lompoc*, 265 F.3d 975, 983 (9th Cir. 2001).

This is hardly the first time that this Court has been told that absolute immunity is necessary for a government official to do his job. *See, e.g.*, Pet. *Malley v. Briggs* Br. 24-25. The Court has been rightly skeptical of such claims. Indeed, the Solicitor General has consistently sought broad absolute immunity for prosecutors, and the Court has consistently refused to abandon the more discriminating functional test. *See* SG *Imbler* Br. 12-22 (arguing unsuccessfully for absolute immunity for everything a prosecutor does); SG

Burns Br. 13-23 (arguing unsuccessfully for absolute immunity for all conduct at issue); SG *Buckley* Br. 13-19 (arguing unsuccessfully for absolute immunity for investigatory conduct); SG *Kalina* Br. 11-23 (arguing unsuccessfully for absolute immunity for all conduct at issue). The Court likewise was not persuaded when the Government argued that absolute immunity was necessary for the Attorney General in his performance of national security functions. Without gainsaying the importance of those functions, the Court rejected the contention that "restraints" in the form of litigation as a check on potential abuses of authority were "completely unnecessary." *Mitchell*, 472 U.S. at 523.[15]

In lamenting that *Iqbal* is not "an adequate substitute for categorical exemption from liability," SG Br. 13 n.3, the Solicitor General forgets that prosecutors have never had a "categorical exemption from liability" under this Court's functional test, and to the extent such a categorical exemption has been sought, the Court has often rejected it. Moreover, what *Mitchell* and *Iqbal* read together show is that even in the context of the Attorney General's national security responsibilities, qualified immunity with rigorous

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[15] The Court does not need to decide whether it would be appropriate to create a *Bivens* claim against federal prosecutors similar to respondents' §§ 1983 and 1985(3) claims. The Court has a freer hand in fashioning the judicially-created *Bivens* remedy than in interpreting Congress's work as codified in § 1983. *See, e.g., Correctional Serv. Corp. v. Malesko*, 534 U.S. 61, 71 n.5 (2001) (noting that state prisoners have § 1983 claim against private prisons, but declining to create similar *Bivens* claim).

pleading requirements strikes the right balance. It is hard to imagine why a local prosecutor involved in investigative functions typically performed by a police officer needs any greater protection. *See Burns*, 500 U.S. at 486 ("The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.").

Calamitous consequences have not resulted from the Court's prior denials of absolute immunity and will not result from denying prosecutors absolute immunity for fabricating evidence during the investigative phase. To be sure, most prosecutors adhere to the highest standards of professional conduct and would not engage in any conduct that looks remotely like the misconduct at issue here. All prosecutors deserve qualified immunity for their investigative functions, which are by no means mandatory,[16] and qualified immunity by its nature provides added protection for conduct that is close to the line or that crosses a line that has not been clearly established. But that is not this case. The conduct here was not of doubtful legality or close to the line. The question here is whether there is going to be any line at all.

B. Alternative Remedies Are Inadequate To Deter Prosecutorial Misconduct

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[16] If the absence of absolute immunity for prosecutors undertaking police work proves too disruptive, prosecutors always have the option of leaving police work to the police who have operated for decades protected only by qualified immunity.

Petitioners' amici describe a host of other remedies to punish prosecutors for misconduct. *See, e.g.*, Nat'l Ass'n of AUSAs Br. 7-16; *see also Imbler*, 424 U.S. at 428-29. The most notable thing about amici's lengthy catalog of supposed remedies, however, is that petitioners have not faced any of them. The highest court in the State of Iowa found that petitioners had violated the Constitution by suppressing exculpatory evidence. *Harrington v. State*, 659 N.W.2d 509, 521-25 (Iowa 2003). What consequences befell the prosecutors for that unconstitutional action? Petitioners did not face so much as a state-bar investigation, and they remain members in good standing of the Iowa bar in private practice in Council Bluffs. "Remedies" that go unused when serious, documented prosecutorial misconduct comes to light are little better, and perhaps worse, than no remedies at all. Unfortunately, the lack of meaningful response is typical. *See* Wayne D. Garris, Jr., *Model Rule of Professional Conduct 3.8: The ABA Takes a Stand Against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829, 842-43 (2009).[17] The reality is that bad prosecutors are deterred by, and punished by, civil-rights suits like this one, or not at all.[18]

Prosecutors, like police officers, need the breathing room provided by qualified immunity,

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[17] *See also* Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, *available at* http://www.chicagotribune.com/news/watchdog/chi-020103trial3,0,610421.story.

[18] The district court found that County Attorney Wilber procured McGhee's 2003 *Alford* plea by fraud. *See* p. 13, *supra*. Nothing has happened to Wilber either.

but they should not be encouraged to believe that they can engage in egregious misconduct like fabricating evidence to frame innocent citizens without suffering any personal repercussions. Prosecutorial misconduct is not merely an issue of academic interest; it affects the interests of real victims and of the public at large. *See, e.g.*, Carrie Johnson, *U.S. Seeks Release of Convicted Alaska Lawmakers*, WASH. POST., June 5, 2009. Prosecutors who consider engaging in misconduct would benefit from even the muted incentives not to violate constitutional rights by fabricating evidence that qualified immunity would provide. *See Malley*, 475 U.S. at 343; *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate").

C. Petitioners' Effort To Immunize A Conspiracy To Frame Innocent Citizens Strikes At The Heart Of § 1983

This is a case in which it is particularly important not to lose the forest for the trees. As petitioners' brief demonstrates, it is possible to construct an argument that isolates particular acts of misconduct and suggests those acts standing alone are either not sufficient to state a constitutional violation or absolutely immune. It is impossible, however, to look at the real conduct at issue here and conclude either that the Constitution is not violated or that the pre-probable-cause misconduct should be cloaked in absolute immunity. This Court has engaged in

painstaking efforts to ensure that prosecutors turn square corners over matters such as whether a laboratory report was introduced through live testimony. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). Such constitutional guarantees are vital, but it makes little sense to preserve finely-reticulated guarantees and then turn around and grant immunity to a blatant effort to convert these protections into a sham by perverting a system designed for the administration of justice to frame an innocent citizen. That is particularly true when one remembers that the absolute immunity inquiry is ultimately an exercise in interpreting 42 U.S.C. § 1983. If § 1983 is construed to grant immunity for conduct so close to the core of what Congress sought to prohibit, then the forest has already been lost.

When immunity is sought, the Court has "reemphasize[d]" that its "role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley*, 475 U.S. at 342. As this Court has previously observed, the Reconstruction Congress enacted § 1983 precisely because it could not trust States and localities to protect the constitutional rights of all citizens—particularly African-Americans—and thus intended "to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights." *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 504 (1982).

The facts of this case strike at the heart of that concern. Rather than pursuing Gates, the white

man to whom most of the actual evidence pointed, petitioners preferred to frame two innocent African-Americans. State authorities have done little to remedy petitioners' unconstitutional conduct. The 1871 Congress intended § 1983 to protect citizens from such a perversion of the judicial process by state and local actors. Section 1983 was designed to prevent the use of state actors and official machinery designed to protect citizens from being perverted into an instrument of oppression. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights"). It would be a tragic inversion of Congress's intent to hold that § 1983 confers absolute immunity on petitioners.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

CURTIS W. MCGHEE JR.
AND TERRY J. HARRINGTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents seek a new constitutional "right not to be framed." But they do not seriously argue that such a right can be divined from this Court's precedents. In fact, the Constitution does not guarantee a fair investigation before a prosecution is commenced. Nor does the Constitution "guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released." *Baker* v. *McCollan*, 443 U.S. 137, 145 (1979).

None of respondents' allegations has been established and, as explained in Part I, *infra*, their brief takes considerable liberties with the record. But even if respondents' allegations were true, petitioners' alleged pre-trial conduct did not inflict any injury that the Constitution recognizes and thus does not support a § 1983 cause of action. As this Court has explained, "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry* v. *Johnson*, 467 U.S. 504, 511 (1984). In this case, that deprivation occurred at trial.

A prosecutor's absolute immunity in judicial proceedings means, at the most basic level, that a prosecutor may not be sued because a trial has ended in conviction. Yet that is what happened here. Respondents avoided what should have been quick dismissal of their wrongful conviction claims by proffering a novel end-run around absolute immunity. Rather than alleging use of false testimony at their trials, which would have required dismissal under *Imbler*, respondents claimed that their rights were violated

during the earlier investigation. Persuaded that this case was about *qualified* immunity, the courts below allowed the claims to go forward under a theory of "substantive due process."

Absolute immunity cannot be evaded by attempting to relocate the operative constitutional injury from trial to investigation in this fashion. Respondents' complaints devote more than 20 pages to the pre-arrest investigation and only a few scattered paragraphs to their trials. Injuries that occur during an investigation are subject to qualified immunity. But respondents did not file suit to reform criminal investigations or vindicate a right to due process in the abstract. As they told the district court after petitioners were denied summary judgment, "Harrington and McGhee seek to recover *damages for an unconstitutional conviction* and resulting imprisonment." McGhee Dist. Ct. Docket No. 228, Attachment 1, at 2 (emphasis added). Success on their claims, they said, necessarily would "impugn[] the validity of their convictions." *Id.* at 7. By their own admission, respondents' injuries occurred at trial, and thus the relevant immunity is the absolute immunity of a prosecutor in judicial proceedings.

Contrary to the claims of respondents and their *amici*, correcting the erroneous decisions below would not "expan[d]" or "exten[d] the reach" of prosecutorial immunity. Ctr. Admin. Crim. L. Br. 3. It would not disturb *Buckley*'s principle that police and prosecutors get the same protection—qualified immunity—when their functions are the same. It would simply reject the legal fiction that where a wrongful conviction occurs at trial, liability can be pinned to some earlier event outside the judicial process. Such an analysis cannot be reconciled with *Imbler*. It is

not possible to uphold absolute immunity in principle while allowing a suit to go forward in which the plaintiffs expressly seek "damages for an unconstitutional conviction."

Although this Court reaffirmed both the principle and rationale for absolute immunity in a unanimous decision last term in *Van de Kamp*, respondents and their *amici* seek to use this case to "advanc[e] qualified, not absolute, immunity as the better and more workable standard to apply" in cases like this one. Ctr. Admin. Crim. L. Br. 2. Respondents believe that if they push their factual allegations to center stage, the Court might be persuaded to create a special exemption from *Imbler* for especially sympathetic plaintiffs.

Given the legal confusion, massive expense, and handicaps to law enforcement that such an outcome would produce, the United States, along with a geographically and politically diverse group of 28 states and the District of Columbia[1] as well as the major national organizations representing district attorneys, federal prosecutors, and state and local governments, urge this Court to overturn the decisions below. Otherwise, as the United States explains, "plaintiffs barred under *Imbler*" would simply do what respondents did here: "draft their complaint to refer to the prosecutor's investigation and preparation of the case instead of his activity at trial." SG Br. 5. Accordingly, the decisions below should be reversed.

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[1] In addition to the 27 states listed on the cover of the brief, the State of Wisconsin informed the Court and parties by letter on July 21, 2009, that it also joins the brief.

I. RESPONDENTS MAY NOT SEEK A NEW LEGAL RULE WITH A DISTORTED ACCOUNT OF THE RECORD.

Recognizing the weakness of their legal position, respondents have chosen to stress their factual allegations—their story of a malicious "frame-up." This is an interlocutory appeal from denial of summary judgment, and thus respondents were entitled to have the courts below view the record in the light most favorable to them. But respondents are *not* entitled to use a distorted and incomplete account of the record to argue for a new interpretation of the Due Process Clause, or to seek a special rule abrogating immunity because they have "allege[d] dozens of pages of detailed facts" in a way they say "[m]ost would-be plaintiffs w[ould] be unable to." Resp. Br. 42, 51. Before turning to the legal and policy arguments raised by respondents and their *amici*, we therefore briefly address respondents' factual recital.

The core of respondents' story is that Hrvol and Richter "abandon[ed] their pursuit of the real suspect"—that is, Charles Gates, the so-called "spooky type individual" who walked dogs—so that they could "frame Harrington and McGhee—two African-American teenagers from across the state line." Resp. Br. 8-9, 17. But the district court did not credit such an account, because it is not what respondents argued below. The record shows that it was the Council Bluffs police, not petitioners, who dropped Gates as a suspect weeks before Harrington or McGhee came to anyone's attention in Pottawattamie County. According to Harrington's version of the facts in the proceedings below, the investigation focused on Gates from July 23 to August 12, 1977. Harrington C.A. App. 83. The last investigative report focusing on

Gates is dated August 12, 1977. J.A. 33. It was not until several weeks later that Nebraska authorities investigating car thefts initiated the contact with Council Bluffs police that eventually brought Harrington and McGhee to their attention. As Harrington himself told the Eighth Circuit, the "first [t]ime Harrington is mentioned" in any police report is September 9, 1977. Harrington C.A. App. 83. Respondents' more dramatic account—that petitioners "abandon[ed] their pursuit of the real suspect" because they preferred to "frame" Harrington and McGhee—is both inflammatory and unsupported by the record. Moreover, their suggestion (at 8) that Gates was dropped as a suspect because he was white and related to a local fireman is rank speculation with no support whatsoever.

Respondents assert that Harrington and McGhee were implicated by nothing more than the unreliable statements of Kevin Hughes, whom petitioners allegedly coached to serve as their "mouthpiece," and claim that "[n]o evidence corroborated" the account of the Schweer murder that Hughes provided to Council Bluffs police. Resp. Br. 4-9. But respondents completely fail to mention facts of record that would have given Hrvol and Richter good reason to believe they were pursuing a valid investigation and a legitimate prosecution.

For example, after Hughes was picked up in early September driving a stolen car, Omaha police—against whom no misconduct has been alleged—independently spent weeks investigating Harrington and McGhee's involvement in the same car-theft ring and issued warrants for their arrests. See McGhee Dist. Ct. Docket No. 111, Attachment 1, at 78-86. The district court acknowledged this as well. See Pet.

App. 59a ("Hrvol and Richter argue that three separate Nebraska law enforcement entities independently suspected and investigated Harrington and McGhee in a car theft ring"). Based on a number of interviews—including an interrogation of Harrington after he was arrested on the car-theft warrant—two Omaha investigators concluded on October 2, 1977, that, in their "strong opinion," Harrington and McGhee, among others, had "direct or indirect knowledge" about the Schweer murder, and that Schweer had been shot "by persons who were attempting to steal an automobile." McGhee Dist. Ct. Docket No. 111, Attachment 1, at 86.

On October 6, 1977, a week after the Hughes statement that respondents describe as "riddled with mistakes," Resp. Br. 6-7, McGhee gave his own statement to Omaha police. McGhee Dist. Ct. Docket No. 124 at 52-81. McGhee admitted that around the time of the Schweer murder in late July, he, Harrington, and two other friends traveled to McIntyre Oldsmobile, the same dealership where Schweer worked. McGhee said the other men planned to obtain keys through a key-switch scheme, then "come back at night and get em a car." *Id.* at 56-58, 74. McGhee also said Harrington carried a shotgun in his trunk, which he had once pulled on McGhee, and that Harrington had "some evil ways." *Id.* at 64-68. When Harrington would "get mad," then "[t]he first thing, he'll be ready to do is go to that trunk [and] snap that gun out." *Id.* at 69. McGhee denied any personal involvement in the Schweer murder. *Id.* at 80. Omaha officer Robert Weise recounted this

statement at McGhee's criminal trial, and the relevant portion is reproduced in the Addendum hereto.[2]

Respondents say Hughes was the "centerpiece of the State's case." Resp. Br. 10. But more than 45 witnesses testified at the two trials. Further, it is undisputed that Harrington and McGhee had full opportunity to impeach Hughes. As one of Harrington's post-conviction counsel characterized it, Harrington's defense attorney "thrashed [Hughes] in front of the jury with his prior inconsistent statements" in "a long, thorough cross-examination." McGhee Dist. Ct. Docket No. 133, Attachment 3, at 540. Although respondents seek "damages for an unconstitutional conviction," their brief and pleadings never come to grips with what happened at those trials. Nor did the district court, because it erroneously focused on the investigation rather than the actual convictions.

No court has held that respondents' trials were unfair due to fabricated or perjured testimony. The Iowa Supreme Court found that Harrington's trial was compromised by an unrelated *Brady* violation and expressly declined to reach other issues. *Harrington*, 659 N.W.2d at 516-517. Moreover, contrary to the misrepresentations of respondents and their *amici*, petitioners have not "admitted" the allegations in this case as facts, and the district court rejected those characterizations. J.A. 77-82. The allegations are taken as true *only* for the purpose of resolving petitioners' immunity claims. *Ibid.* Were this

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[2] A federal court may take judicial notice of state criminal proceedings on which a § 1983 claim is based. *E.g.*, *Logsdon* v. *Hains*, 492 F.3d 334, 338 n.1 (6th Cir. 2007).

case to go to trial, petitioners would vigorously challenge them.

Given the posture of this case, it is neither possible nor appropriate to draw conclusions about how the Schweer murder investigation unfolded. It is one thing to say the district court accepted respondents' view of the record, and quite another to argue, as respondents do here, that their factual allegations should compel this Court to rewrite its Due Process Clause jurisprudence or create a special exception to *Imbler*. Respondents' selective and sensationalized account should not distract this Court from the question presented, nor prevent it from reversing the erroneous decisions below.

II. RESPONDENTS' ALLEGED CONSTITUTIONAL INJURIES OCCURRED IN THE JUDICIAL PROCESS.

The issue in this case is not whether respondents were deprived of a constitutional right. If they were convicted because perjured testimony was introduced at their trials, those convictions would have violated the right to a fair trial and would be subject to reversal. The issue, rather, is whether the courts below failed to apprehend the "location of the injury." *Buckley*, 509 U.S. at 271-272.

This Court has explained that "[p]rocedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person's life, liberty or property." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 375 (6th ed. 2000). In a criminal proceeding, that "decision-making process" is the trial; accordingly, freedom from conviction based on perjured testimony is a trial right. See *Pyle*, 317 U.S.

at 216; *Mooney*, 294 U.S. at 112. Even where police or prosecutors "extort[]" testimony "from a witness by violence and torture," due process protects the accused person "against a *conviction* based upon such testimony." *Hysler* v. *Florida*, 315 U.S. 411, 413 (1942) (emphasis added); see also Mitchell P. Schwartz, Comment, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1119 (2003) ("police violate no federal right simply by fabricating a confession"; constitutional rights are implicated "once that fabricated confession is used in a criminal proceeding").

Respondents ask the Court to recognize a *new* right against fabrication, or as they call it, a "right not to be framed by the government." Resp. Br. 28. As respondents describe it, this new right would be independent of conviction, damages, or any deprivation of liberty whatsoever; it would apply regardless of whether testimony was used *at all* in any judicial proceeding. See *id.* at 24-25. Respondents do not seriously argue that there is a hint of such a right in this Court's jurisprudence. The core section of their brief on this point is devoid of a single citation to the Court's criminal procedure cases. See *id.* at 22-27. This fanciful argument cannot salvage their wrongful conviction claims.

A. There Is No Freestanding Constitutional "Right Not To Be Framed."

A "right not to be framed," independent of conviction or some other deprivation of liberty, may be an interesting policy proposal. But in interpreting § 1983, this Court has emphasized that its "role is * * * not to make a free-wheeling policy choice." *Malley*, 475 U.S. at 342. There is no history or tradition establishing a right to be free of improper investiga-

tion in the abstract. Allegations that are "horrible" or "'undeniably tragic'" do not suffice to create previously unrecognized due process rights, and "[t]he creation of a personal entitlement to something as vague and novel" as a right not to be framed "cannot simply g[o] without saying." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 751, 755, 766 (2005) (bracketed alteration in original). The proposed right on which respondents rely is so foreign to this Court's jurisprudence that there is no analogous rule from which it could even be inferred.

The first problem is that it is the Fourth Amendment, not the Due Process Clause, that regulates "pretrial deprivations of liberty." *Albright*, 510 U.S. at 274. The Fourth Amendment prohibits unreasonable searches and seizures; it does not provide a field manual for criminal investigations. Respondents acknowledge that their arrest warrants were issued pursuant to preliminary informations "signed by a detective and approved by Richter and Hrvol" in their capacities as prosecutors. Resp. Br. 10. Moreover, a Fourth Amendment claim for false arrest may not be leveraged into an action for wrongful prosecution, since at common law the two torts were "'entirely distinct.'" *Wallace* v. *Kato*, 549 U.S. 384, 390 (2007).

Investigative acts in and of themselves do not implicate an accused person's due process rights. For example, where police obtain evidence against a defendant by illegally searching a third party's property, the third party might have a Fourth Amendment claim, but the defendant's own due process rights are not violated; he is "is aggrieved * * * *only through the introduction* of [the] damaging evidence." *Rakas*, 439 U.S. at 134 (emphasis added). Nor does a suggestive

preindictment identification procedure inherently intrude on a constitutionally protected interest. *Manson*, 432 U.S. at 113 n.13. In a case involving the murders of three children, this Court rejected the notion of a due process right to a particular standard of care or diligence by officers investigating a crime. *Castle Rock*, 545 U.S. at 768. Even where an investigation culminates in an information based on flawed evidence, there is no due process right "to be free from prosecution except on the basis of probable cause." *Albright*, 510 U.S. at 272 (plurality opinion).

Respondents (at 21) compare the conduct alleged in this case to *Rochin*, where police officers had a suspect's stomach pumped to gain evidence for a prosecution. But *Rochin* does not help respondents. In that case the Court said its concern was the impact that such conscience-shocking tactics had on "the *proceedings by which this conviction was obtained*." 342 U.S. at 172 (emphasis added). As Justice Frankfurter further explained, "[e]ven though the concept of due process of law is not final and fixed, [its] limits are derived from considerations that are fused in the whole nature of our *judicial process*." *Id.* at 170 (emphasis added).

Respondents argue (at 24-25) that fabrication violates a constitutional right even where a suspect pleads guilty without trial. But that radical notion could create grounds for direct appeals or habeas claims in circumstances where this Court has rejected similar theories because they would hamper investigation of violent crimes. It is settled, for example, that a confession elicited by reference to nonexistent evidence or other deceit does not violate the Constitution if it is otherwise voluntary. See, *e.g.*, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (per cu-

riam) (upholding confession following officer's false statement that defendant's fingerprints were found at the crime scene); *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969) (police misrepresentation of co-defendant's statements did not render confession inadmissible).

A suspect who is coerced into providing a truly involuntary confession is more directly affected by improper investigative tactics than a person who is unknowingly the target of efforts to fabricate testimony against him. Yet eliciting a false confession does not violate the Fifth Amendment unless the confession is introduced at trial. *Chavez*, 538 U.S. at 767 (plurality opinion).[3] As *amici* state and local government organizations explain (at 23), "[t]he fact that an investigation utilizes tactics that create a threat to the right to fair trial is not enough to violate due process; the critical constitutional question is whether the ensuing trial is fair."

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[3] Respondents' *amicus* Black Cops Against Police Brutality suggests (at 19-21) that *Chavez* stands for the principle that an improper criminal investigation may give rise to a due process claim "whether or not trial follows." This characterization is misleading and confuses the two separate holdings in *Chavez*. Although the Court held that the plaintiff could not bring a Fifth Amendment claim because his confession was never introduced, it also held that he could proceed with a substantive due process claim against the interrogating officer for "torturous methods" and "brutal" conduct during the interrogation. 538 U.S. at 783-784 (Stevens, J., concurring in part and dissenting in part). This physical abuse worked a deprivation of liberty independent of judicial proceedings. There is no similar allegation in this case.

B. A Due Process Violation Requires A Deprivation Of Liberty, Not Merely A Prosecutor's "Intent" To Use False Evidence In The Future.

By its plain words, the Due Process Clause applies where government action deprives an individual of "life, liberty, or property." U.S. CONST. amend. XIV, § 1. Without such a deprivation, there is no basis for inferring a "right not to be framed." A right to an investigation that is performed according to certain standards, apart from any deprivation of liberty, would be "an entitlement to nothing but procedure—which we have held inadequate even to support standing." *Castle Rock*, 545 U.S. at 764. What liberty interest were respondents deprived of by petitioners' investigation other than the arrests that followed the immunized filing of criminal informations or the trials where petitioners functioned as advocates? Respondents have no answer. As courts have observed, a defendant has no § 1983 cause of action if police or prosecutors fabricate witness testimony and then tuck it away in a drawer unused. *Buckley II*, 20 F.3d at 795; *Landrigan* v. *City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980).

Respondents argue that this hypothetical is not relevant here because petitioners "intend[ed]" to use the information against specific suspects. Resp. Br. 23. But a prosecutor's intent or state of mind—the "circumstances and motivations" behind the prosecution—are irrelevant where a claim involves alleged use of false evidence at trial. *Imbler*, 424 U.S. at 419 n.13. Otherwise, fact-bound questions of intent would frustrate the very purpose of absolute immunity: to "defeat[] a suit at the outset." *Ibid.* A prosecutor does not deprive a person of liberty by "intending"

to use evidence at some point in the future. In *Imbler*, this Court attached no significance to the petitioner's allegation that the prosecutor had engaged in a "conspiracy" with police prior to his charging and conviction. See *id.* at 416. The prosecutor's use of false evidence at trial was the "gravamen" of the petitioner's claim. *Ibid.*

There is no scienter test for absolute immunity, and thus immunity is not defeated by allegations about a prosecutor's state of mind. This principle was established more than 80 years ago in *Yaselli*, in which the Court upheld immunity for a prosecutor who conspired to have himself appointed so that he could wrongfully prosecute the plaintiff. It would be hard to imagine a more extreme example of prosecutorial malice. Yet this Court summarily affirmed the Second Circuit's ruling that, since a prosecutor has immunity even where he acts "willfully and maliciously" as an advocate, he also has immunity where he schemes in advance "*in order* to act willfully and maliciously. * * * We are unable to distinguish between the two cases in principle." 12 F.2d at 407 (2d Cir. 1926), summarily aff'd, 275 U.S. 503 (1927) (emphasis added).

Some of respondents' *amici* call it "hypertechnical" to argue that actual use of evidence, not just fabrication, is necessary for a cause of action. Crim. Def. Lawyers Br. 8. But there is no such thing as a constitutional tort without a cognizable injury. Respondents cite *Carey* v. *Piphus* for the proposition that a criminal defendant may sue under the Due Process Clause even where he has suffered "no damages" at all. Resp. Br. 25. But this Court has never recognized such a principle in criminal procedure cases. In *Carey*, the Court held that because the

guarantee of procedural due process has intrinsic value, a public school student could sue for nominal damages based on his distress at having been suspended without a hearing. 435 U.S. at 264; see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 732 (2d ed. 1988) ("At the core of the procedural due process right is the guarantee of an opportunity to be heard"). But in this case respondents were not denied the right to be heard. Defense counsel had full opportunity to examine and impeach the state's witnesses at trial, and respondents have not established that these witnesses' alleged perjured testimony caused their convictions. An investigation is not a government "process" in which a suspect has the right to be heard. And an investigation cannot, in itself, deprive a suspect of liberty or property. Only a trial or other judicial proceeding can do so.

C. Respondents Have No Substantive Due Process Claims.

The courts below characterized the alleged fabrication of evidence in this case as a violation of substantive due process. For their part, respondents tiptoe around this label, invoking substantive due process by implication when they say that petitioners engaged in "conscience-shocking misconduct." Resp. Br. 25; see also *id.* at 21 n.6 (calling the difference between procedural and substantive due process "beside the point here"). At any rate, respondents' claimed "right not to be framed" is baseless under substantive due process as well.

As with procedural due process, a fundamental element of a substantive due process claim is a deprivation of liberty. LAFAVE ET AL., CRIMINAL PROCEDURE at 88 (to establish a substantive due process claim, "the governmental action * * * must deprive

the individual of a liberty interest that history and tradition establish as entitled to due process protection"). As discussed above, respondents were not deprived of any liberty from an investigation, and there is no history or tradition that would support such a claim. Pressure tactics applied to third-party witnesses do not implicate substantive due process because they do not deprive the defendant of any liberty interest. *Conviction* based on the known *perjury* of such witnesses is "conscience-shocking" and for this reason has long been recognized as an archetypal due process violation. But characterizing fabrication of evidence as a substantive due process violation simply circumvents the rigorous analysis required by this Court's precedents.

D. The New Right Respondents Seek Would Inappropriately Interject Federal Courts Into State Criminal Procedure.

Respondents' claimed right not to be framed cannot be reconciled with this Court's longstanding approach to state criminal procedure. The Court has stressed its "continuing reluctance to treat the Fourteenth Amendment as a font of tort law." *Castle Rock*, 545 U.S. at 768 (internal quotation marks omitted). In formulating criminal procedure rules under the Due Process Clause, the Court has been exacting, because "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling* v. *United States*, 493 U.S. 342, 352 (1990). "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful bal-

ance that the Constitution strikes between liberty and order." *Medina* v. *California*, 505 U.S. 437, 443 (1992).

Respondents say "[i]t is difficult to imagine that a constitutional line is not crossed the moment that investigators shift their focus from solving a crime to framing an innocent citizen." Resp. Br. 26-27. Yet they do not explain how a court could determine when such a "shift" occurred or line was crossed. A basic requirement of § 1983 is that "[t]he contours of [a] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. How would a court reliably determine years later whether an aggressive witness interview crossed the line to coercion or subornation of perjury? As *amici* States note (at 18), "[t]he line between permissible inducements and impermissible coercion is * * * often a difficult one to draw," especially where an investigation involves accomplices or other reluctant witnesses.

This Court is not "a rule-making organ for the promulgation of state rules of criminal procedure." *Kansas* v. *Ventris*, 129 S. Ct. 1841, 1847 n.* (2009). In the absence of an established constitutional guarantee, such as the right against unreasonable search or seizure, it has declined to promulgate tests for "reasonable" conduct by criminal investigators, because "the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases." *Dunaway* v. *New York*, 442 U.S. 200, 213 (1979). Moreover, "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to ex-

ercise substantial deference to legislative judgments in this area." *Medina*, 505 U.S. at 445-446.

Such deference is especially warranted here. Based on experience, the 28 *amici* States argue that affirmance in this case would make prosecutors more reluctant to participate in pre-charge investigations, depriving both the public and defendants of the benefits of such participation. States Br. 5-15.

In summary, there is no cause of action for fabrication of evidence. The right not to be convicted based on false evidence is a trial right, subject to ordinary trial immunities.

III. THE ABSOLUTE IMMUNITY OF PROSECUTORS, NOT THE QUALIFIED IMMUNITY OF POLICE OFFICERS, APPLIES TO PETITIONERS' DECISION TO UNDERTAKE A PROSECUTION.

Respondents and their *amici* argue that for purposes of immunity, petitioners should be treated as police officers rather than prosecutors. See Resp. Br. 27-37. Their theory is that fabrication of evidence caused a constitutional injury. Police would be liable for such fabrication under § 1983, they claim, and so petitioners should be liable as well. This argument is erroneous because it misperceives the basis for liability when alleged fabricated evidence leads to the filing of charges and a later conviction.

A. Since A Prosecutor Cannot Be Held Primarily Liable For A Prosecution, He Cannot Be Held Vicariously Liable.

As an initial matter, there is no authority holding that police officers may be sued under § 1983 for fabrication of evidence without regard to the use of that evidence. As discussed above, there is no frees-

tanding constitutional "right not to be framed." It is only the decisions a prosecutor makes in initiating and conducting a prosecution that have the potential to deprive a criminal defendant of liberty.

As the United States explains, a police officer is not liable for a wrongful conviction because the act of fabrication itself is a constitutional violation, or because it is somehow foreseeable that fabricated evidence may cause a later conviction. Rather, an officer "is liable because the introduction of the fabricated evidence at trial is a constitutional violation, and even though he personally did not commit this violation, his earlier act of fabrication was its animating force," thus making the officer "an appropriate person to bear responsibility." SG Br. 20-21. In other words, the officer may be held liable because his fabrication drove the initiation of criminal proceedings.

The common-law analogy to this sort of misconduct is malicious prosecution, for which a police officer could be held liable under a form of vicarious liability known as "procurement." But "[i]t is both a misuse of language and a misunderstanding of doctrine to speak of a prosecutor procuring his own institution of proceedings; he in fact initiated the proceedings, rather than procuring them." SG Br. 21. The prosecutor is, of course, immune for initiating proceedings. Thus, "[t]o impose a form of vicarious liability for it, when the law chooses not to impose direct liability, would be anomalous." *Id.* at 21-22. "[P]rocurement liability for malicious prosecution exists to assign liability to a blameworthy person for wrongful institution of a proceeding actually performed by another. The theory is irrelevant when the blameworthy person and the initiator of the proceeding are one and the same." *Id.* at 29. As the Solicitor

General aptly puts it, in a case of malicious prosecution, the police officer in effect "stands in the shoes of the prosecutor"; but the prosecutor, who is immune for initiating the proceedings, "*already* stands in his own shoes." *Id.* at 26, 29.

Respondents argue (at 28) that "conduct, not the identity of the state actor, drives the constitutional analysis." But that overlooks the fact that a prosecutor has absolute immunity when he engages in the "conduct" of initiating a wrongful prosecution, while a police officer does not when procuring such a prosecution. Moreover, this case does not involve a police officer (or even a fellow prosecutor) who deceived an unknowing prosecutor; fabricating evidence "does not constitute a procurement" where, as here, the decision to file charges was left to the prosecutor's "uncontrolled choice." RESTATEMENT (SECOND) OF TORTS § 653 cmt. d (1977).[4] In short, a "prosecutor's pretrial fabrication is part and parcel of the wrongful initiation of proceedings on which tort liability is predicated—and for which the prosecutor is absolute immune." SG Br. 31.

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[4] Contrary to respondents' unsupported assertion, it is not settled that a fabricator of evidence is liable under § 1983 "regardless of whether he deceives the trial prosecutor into using the phony evidence, coerces the trial prosecutor into using it, or conspires with the trial prosecutor." Resp. Br. 33. See, *e.g.*, *Wray* v. *City of New York*, 490 F.3d 189, 193-195 (2d Cir. 2007) (prosecutor's decision to offer evidence, derived from an impermissibly suggestive identification procedure, defeated claim against officer); *Yarris* v. *County of Delaware*, 465 F.3d 129, 143 (3d Cir. 2006) (detectives not liable for prosecutor's decision to use evidence obtained through impermissible interrogation techniques, even though prosecutors were also complicit).

Respondents do not seriously contest the Solicitor General's analysis. Their suggestion that procurement is a species of "inchoate," rather than vicarious, liability is supported by nothing more than a citation to one case that had nothing to do with the criminal process. See Resp. Br. 34 n.11 (citing *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946)). Nor did *Thomas* involve any claim of prosecutorial immunity. See *id.* at 37 (discussing 734 F.2d 185 (5th Cir. 1984)). *Thomas* simply anticipated this Court's later decision in *Malley* that, where a reasonable officer knows an arrest warrant application is defective, the application is not immunized by a magistrate's subsequent issuance of the warrant.

B. Correcting The Erroneous Ruling Below Would Not Give Prosecutors Greater Immunity Than Police Officers For The Same Functions.

The *Buckley* Court would not have allowed claims like those in this case to survive. *Buckley* stressed that an allegation of fabricated evidence does not affect the "tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not." 509 U.S. at 274 n.5. As the United States observes, in *Buckley* "every Member of this Court suggested that the distinction between the preparation and the use at trial of fabricated evidence has constitutional significance." SG Br. 15. *Buckley* reserved the question whether the plaintiff could state a cause of action for fabricated evidence (on remand, the Seventh Circuit held he could not) and said that immunity for *use* of that same evidence at trial was consistent with "traditional principles of absolute immunity." 509 U.S. at 267 n.3. Importantly, *Buckley* warned that cause of

action and immunity should not be "conflate[d]." *Id.* at 274 n.5.

In evaluating "whether a complaint has adequately alleged a cause of action for damages" that is not barred by immunity, it is the "location of the injury" that is "relevant." *Buckley*, 509 U.S. at 271-272. Here the alleged injury occurred at trial. Regardless of any additional conduct, absolute immunity bars suit where, as here, a "prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim." *Van de Kamp*, 129 S. Ct. at 862. Respondents' suggestion that Richter's role deprived him of trial immunity (Resp. Br. 35 & n.12) is unavailing. "Decisions about indictment or trial prosecution will often involve more than one prosecutor within an office. We do not see how such differences in the pattern of liability among a group of prosecutors in a single office could" affect application of *Imbler*. *Van de Kamp*, 129 S. Ct. at 862. Immunity protects "the proper functioning of the office," not just individual prosecutors. *Ibid.*

Correcting the erroneous ruling below would not alter *Buckley*'s principle that qualified immunity applies where police or prosecutors engage in purely investigative conduct. Respondents make much of the fact that Hrvol at certain times "performed classic police work," including "canvassing the neighborhood" near the crime scene. Resp. Br. 32. But this is beside the point. No one disputes that, had Hrvol performed a warrantless search or assaulted a suspect while he was going door-to-door—in other words, had he committed a tort whose elements did not involve filing criminal charges or participating in a trial—he would have had only qualified immunity. In such a case, the "location of the injury"—the point

where a constitutional right was infringed, giving rise to a present and complete cause of action—would be in the investigation, not the judicial process.

Respondents and their *amici* mistakenly suggest that correcting the erroneous ruling below would create "perverse incentives for unethical prosecutors to exercise their discretion to charge suspects as a means of immunizing misconduct they committed at the pre-indictment stage." Ctr. Admin. Crim. L. Br. 2. An uncharged suspect has no cause of action for an inept or even malicious investigation; his liberty is not imperiled *until* he is charged. Thus there would be no "perverse incentive" to file charges; a prosecutor—or, for that matter, a police officer—has no need to inoculate himself against a lawsuit that could not be brought in the first place.

Respondents argue (at 44) that "an absolutely immune act does not * * * break the chain of liability or preclude damages proximately caused by earlier, non-immune acts whose intent and natural consequence were to cause those damages." But this argues against a straw man. Respondents' claims are precluded not because their murder trials broke a causal chain, but because the prosecutors' absolutely immunized use of testimony at those trials "constitutes an essential element of [their] claim" of wrongful conviction. *Van de Kamp*, 129 S. Ct. at 862.

Respondents argue the *inverse* of *Van de Kamp*: that non-immunized events in a causal chain can negate absolute immunity. But as the United States explains (at 13), "Respondents could not omit from a well-pleaded complaint an allegation that the fabricated evidence was introduced at trial to obtain their convictions; that fact is essential to show the causal

connection between the fabrication and the actual harm they suffered, which was imprisonment on conviction." Respondents have pleaded exactly that. As they told the district court, "success on Harrington and McGhee's claims would necessarily imply that their criminal convictions were invalid." McGhee Dist. Ct. Docket No. 217 at 2.

Similarly, contrary to respondents' characterization, petitioners have never made any argument that acts taken during the judicial process "wash back" or "launder" earlier misconduct. See Resp. Br. 18, 36, 48. The problem in this case is not some imagined claim of retroactive immunity. The problem is that the courts below used the evidence-gathering process, which provided no cause of action, to *prospectively* nullify absolute immunity at a later point when the evidence actually was used. *Van de Kamp* precludes such an outcome.

Respondents argue (at 43) that this Court should simply find a constitutional cause of action based on petitioners' alleged pre-trial conduct, and that it "need not address the question of causation." What respondents actually mean is that the Court should overlook the disjunction between their allegations about the investigation and their pursuit of damages for a wrongful conviction. By factoring out the trial where evidence was actually used, respondents essentially ask this Court to create an inchoate tort, something neither federal nor common law has ever recognized. There is no "attempt" liability in tort law, which requires a cognizable injury for a viable damages claim.

Neither respondents nor their *amici* attempt to defend the causation analysis provided by the courts below. Petitioners' opening brief (at 28-33) explained

why the Second Circuit's *Zahrey* decision, on which the courts below primarily relied, has no support in this Court's § 1983 decisions. *Zahrey* held that a prosecutor should get only the qualified immunity of a police officer if it was "foreseeable" that false evidence he gathered during an investigation would be used in later judicial proceedings. Respondents and their *amici* mention *Zahrey* only in passing, and make no attempt to argue that its novel application of proximate cause can withstand scrutiny. The *Zahrey* court's "theory would import into Section 1983, in an entirely novel way, generalized notions of causation. At the same time, it would disregard specific common law doctrine relevant to the question—namely the tort of malicious prosecution and its limits." SG Br. 14.

IV. RESPONDENTS' THEORY WOULD INVITE A FLOOD OF NEW MERITLESS LITIGATION AGAINST PROSECUTORS.

This Court has acknowledged, candidly and repeatedly, that the rule of absolute immunity involves a "balance of evils" and carries social costs, most notably that it may deprive some genuinely wronged plaintiffs of a recovery from prosecutors.[5] See *Van de Kamp*, 129 S. Ct. at 859; *Imbler*, 424 U.S. at 427. Nonetheless, respondents and their *amici* seek to use this case to challenge *Imbler*'s continued viability, particularly the policy principles the Court articulated to justify absolute immunity. The *Imbler* court observed that almost any defendant who resented his prosecution could ascribe "improper and malicious

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[5] Respondents' separate claims against police officer defendants and the City of Council Bluffs are not at issue in these proceedings.

actions to the State's advocate," and that "if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 424 U.S. at 425. Respondents nonetheless argue (at 50) that these "floodgates concerns were vastly overstated even before" this Court's decision in *Iqbal*, and that after *Iqbal* they "are wholly misplaced." Some of their *amici* effectively dismiss *Imbler* altogether, noting that prosecutors "are used to court proceedings and are naturally equipped to deal with depositions and document-production." Crim. Def. Lawyers Br. 21.

These arguments fail to account for the fact that respondents have asked the Court to resolve this case by creating a new constitutional "right not to be framed." And even if the Court were to affirm on some other basis, it would work a radical change in the law of immunity. So the proper concern here is the impact of expanding the meaning of due process by allowing a constitutional claim for wrongful conviction to be relocated from trial to investigation.

Respondents' "right not to be framed" by fabrication of testimony would cause an outpouring of new litigation aimed at prosecutors. As respondents describe it, this right would be independent of conviction, damages, or any deprivation of liberty whatsoever. It would apply regardless of whether use of testimony was harmless error; indeed, whether the testimony actually was used *at all* in *any* judicial proceeding. All that would be required is an allegation that prosecutors "fabricate[d] evidence against someone during an investigation with the *intent* to

use that evidence at trial, if necessary." Resp. Br. 24 (emphasis added).

Such a new right would encourage mischief beyond even what the *Imbler* Court envisioned. A prosecutor would face liability anytime a witness recanted testimony and blamed it on undue prosecutorial pressure. A defendant could wield this right to attempt to stop or delay an investigation or prosecution. "[T]he fabrication," respondents say (at 25), "may come to light after the intended victim is arrested but in time to save him from wrongful conviction." Even more alarming, since respondents say the "right not to be framed" should be independent of trial or conviction, such claims would not be barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994). Even a convicted and imprisoned felon apparently could sue claiming that a prosecutor had fabricated evidence and violated his "right not to be framed," notwithstanding other evidence that might have established guilt beyond a reasonable doubt.

Allowing plaintiffs to blame investigative misconduct for their convictions would encourage litigation that had previously been regarded as frivolous, and such suits would no longer be susceptible to ready dismissal. With this case as a precedent, a plausible allegation that a prosecutor had coerced or pressured a witness somewhere outside the judicial process, coupled with a later conviction, would suffice to plead a constitutional violation. Thus, far more wrongful conviction claims would have to be litigated under qualified immunity, and prosecutors would be forced to participate in extended discovery and litigation.

Massive personal liability would turn on questions of fact or intent, and "because an official's state

of mind is 'easy to allege and hard to disprove,' insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998). Moreover, because fact questions may not be raised on interlocutory appeal, denials of motions to dismiss or summary judgment would not be subject to immediate review. Affirming the decisions below would greatly aggravate the concern this Court expressed in *Imbler* that litigation by convicted defendants could inappropriately divert prosecutors' attention and resources.

* * *

In summary, respondents' proposed "right not to be framed" has no legal foundation, and their immunity arguments are incorrect under this Court's precedents and unsound as a matter of policy. Even if respondents were "genuinely wronged," *Imbler*, 424 U.S. at 427—and there is no basis to draw that conclusion here—that would not give them a special cause of action or exempt them from immunity principles that this Court has consistently reaffirmed.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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OCTOBER 2009

DISTRICT COURT OF IOWA
POTTAWATTAMIE COUNTY

State of Iowa
v.
Curtis William McGhee

No. 17852

Transcript of Proceedings (excerpt)
May 5, 1978

[334] DIRECT EXAMINATION, (Cont.)

By Mr. Hrvol, at 2:30 p.m., 5-5-78:

Q. Officer Weise, it's been rather a lengthy recess of the Court. I'd like to remind you you're still under oath. Now, Officer Weise, did this defendant, in his conversation with you concerning any trips made to McIntyre Oldsmobile-Cadillac in Council Bluffs, Iowa, in July of 1977, indicate a specific date in July?

* * *

THE WITNESS: A. He indicated a couple of different time periods that I pinned down to the month of July. He did not reference a specific date.

MR. HRVOL: Q. With reference to your report before you on page 9, is there--was there some conversation concerning a Stone Soul picnic in Carter Lake, Iowa?

THE WITNESS: A. Yes.

Q. Did you ask him with reference to that date, which is, I believe, the 4th of July, 1977, when he

made this trip to Council Bluffs, McIntyre Oldsmobile-Cadillac?

A. Yes.

Q. And how close to that date was his trip to Council Bluffs, according to Mr. McGhee?

A. He had a good three weeks or so.

Q. And did you question him further on that point?

A. Yes.

Q. What did you ask him?

A. Said we pinpointed the date of the Stone Soul picnic being the 4th of July. And he said that it was after the 4th of July, about two or three weeks after the 4th.

Q. Did he say on that specific date how he got to McIntyre [336] Oldsmobile-Cadillac in Council Bluffs?

A. Yes.

Q. And how did he get there?

A. In Terry Harrington's Oldsmobile.

Q. Did he happen to mention who he was with on that occasion?

A. Yes.

Q. Who was he with, if you know?

A. Terry Harrington.

Q. I believe if you reference page 3 of your report--

A. Anthony Houston, Arnold Kelly.

Q. Those three individuals were with Mr. McGhee; is that right?

A. That's what he told us.

Q. Did you ask him what his purpose was in going to McIntyre Oldsmobile-Cadillac on that date?

A. Yes.

Q. What was his response, if you recall, generally?

A. They went to get some keys, look at some cars and get some keys.

Q. Did you ask him why he would want keys to cars?

A. Yes.

Q. What was his response to that, generally?

A. They were going to return and get the cars.

Q. Did he say when they would return and get the cars?

A. At night.

[337] Q. Now, Officer Weise, did you ever ask this defendant if he knew a gentleman by the name of Terry Harrington?

A. Yes.

Q. And what was his response, if you recall?

A. Yes. He knows him.

Q. Did you ask him specifically whether he knew of a shotgun?

A. Yes.

Q. What was his response to that?

A. He said yes. He knew that Harrington had a shotgun.

Q. Now, referring specifically to page 13 of that statement, Officer Weise, did you ask him a specific question with regard to ownership of a shotgun?

A. Yes.

Q. Could you read that question, please?

A. Question. "You ever see any one of them three individuals that you was riding with in this Oldsmobile to go to Council Bluffs have a gun?"

Q. What was his response, Officer Weise?

A. He answer, "Yep. Terry Harrington, only one I knew had a shotgun in the back trunk of his car. He's the only one. I never heard him talking about using it. But I know he liked carrying it around with him."

Q. Referring specifically to page 17 of that statement, Officer Weise, did you ask him another question concerning the whereabouts of that shotgun?

[338] A. Yes.

Q. And the ninth line down on that statement, Officer Weise. Did he give you a response to that question?

A. Yes.

Q. What was his response?

A. "Yeah. It's been in his trunk. Yeah. I've seen it in there."

Q. What was your next question to him, Officer Weise?

A. I asked him, "All the time?"

Q. And what was his response?

A. He answered, "It's been there all the time."

Q. Did you ask him if he had personal knowledge of Mr. Harrington using that weapon on anyone?

A. Yes.

Q. What was his response to that question? The last line on page 17.

A. He answered, "See, man, he's got some evil ways. I can't quite say, but I don't know if he did it or not."

Q. What was your next question to him?

A. "Could you elaborate more on that? What do you mean, 'He has evil ways'?"

Q. What was his response to that?

A. He answered, "You know, man. Terry gets to the point, man, you know, he just can't cope, like he's a big front man. Like when you tell him about his-self, he'll get mad, man. [339] The first thing he'll be ready to do is go to that trunk. That's the first thing. Hey, man. You know, he tried to get tough with you, man. You ain't nothing, man. And the first thing he do, if he can whup you, man, you know he's going to go for his trunk. That's what he going to do."

Q. What was you next question to him?

A. "By that, 'Go for the trunk', you mean get his gun out?"

Q. What was his response?

A. He said, "Go for that trunk, snap that gun out. That's what he's gonna do."

Q. Did he ever indicate to you in his statement, Officer Weise, that he knew Kevin Hughes?

A. Yes.

Q. Did you ask him if Kevin Hughes might know anything about the man in Council Bluffs who was killed?

A. Yes.

Q. Referring to page 26 of the statement, what was his response to that question?

A. He said, "I think he do. I think he knows. I think Terry knows and Arnold Kelly. I think they knows who did it.

Q. Officer Weise, when you asked him if he personally had any involvement in the shooting death of Mr. Schweer, what was his response to you?

A. He said, "No."

[340] Q. He said he had no knowledge of it or participation in it; is that true?

A. Yes.

Q. At the completion of his statement, Officer Weise, did he indicate--did you ask him whether or not he'd want to change anything about that statement?

A. Yes.

Q. What did he indicate to you?

A. He said, "No."

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(8)

SUPREME COURT, U.S.
FILED
JUL 20 2009
OFFICE OF THE CLERK

No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA, ET AL.,
PETITIONERS

v.

CURTIS W. MCGHEE, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a prosecutor is subject to personal liability under 42 U.S.C. 1983 for a wrongful conviction and incarceration where the prosecutor allegedly procured false testimony during the criminal investigation and then introduced that same testimony against the criminal defendant at trial to obtain a conviction.

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In the Supreme Court of the United States

No. 08-1065

POTTAWATTAMIE COUNTY, IOWA, ET AL.,
PETITIONERS

v.

CURTIS W. MCGHEE, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States has a substantial interest in the circumstances in which federal officers can be liable in a civil action for alleged violations of constitutional rights. The United States also has a substantial interest in the rules of pleading and proof in civil actions against federal officers. Although this case involves a claim against state prosecutors under 42 U.S.C. 1983, this Court has invoked its Section 1983 jurisprudence in cases involving the implied cause of action against federal officers for the deprivation of constitutional rights, recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT

1. In 1977, John Schweer was shot and killed while working as a security guard at an automobile dealership in Council Bluffs, Iowa. Pet. App. 4a, 24a. Two Council Bluffs police detectives led the murder investigation. Petitioners Joseph Hrvol and David Richter, both prosecutors for Pottawattamie County (which embraces Council Bluffs), were involved in the investigation. *Id.* at 3a-4a, 25a, 81a-82a.

Council Bluffs authorities came to believe that one Kevin Hughes had information about the Schweer murder; on questioning, Hughes eventually alleged that respondents Curtis McGhee and Terry Harrington murdered Schweer. Pet. App. 6a-7a, 28a-32a. Respondents were then charged with the murder, and prosecuted by petitioners.[1] Respondents were found guilty of first degree murder in separate trials at which Hughes testified against them. Each was sentenced to life in prison. *Id.* at 7a, 35a-36a.

In 1999, Harrington obtained previously undisclosed reports from the Council Bluffs Police Department, which pointed to the existence of another suspect for the murder. Harrington pursued state post-conviction relief based on this failure to disclose exculpatory evidence, and the Iowa Supreme Court ultimately vacated his conviction. Pet. App. 8a, 38a-39a. The State declined to retry him, and all charges were dismissed. McGhee reached an agreement with the district attorney to enter an *Alford* plea to second degree murder, and to be resentenced to time already served. *Id.* at 8a, 43a-44a.

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[1] "Petitioners" in this brief refers to Hrvol and Richter. The record is not entirely clear as to whether both Hrvol and Richter participated in the prosecutions of both respondents; this brief assumes they did.

2. Respondents brought actions in the United States District Court for the Southern District of Iowa against petitioners and others, pleading (as relevant here) several claims under 42 U.S.C. 1983. Respondents claimed, *inter alia*, that in investigating Schweer's murder, petitioners coerced Hughes to implicate respondents in the murder; disregarded obviously false details of Hughes' account and coached him to give an account more consistent with known facts; and coerced false witness testimony to corroborate Hughes' story. See Pet. App. 30a-35a.

3. Petitioners moved for summary judgment on the grounds of absolute and qualified immunity, which the district court denied in relevant part. The court first held that petitioners are not protected by absolute immunity for coaching and coercing witnesses to offer false or fabricated evidence during the investigation, because petitioners lacked probable cause to arrest either respondent for any crime, Pet. App. 59a-73a, and under *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 273 (1993), "prior to the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity," Pet. App. 55a. The district court concluded that petitioners are, however, entitled to absolute immunity when initiating criminal proceedings and presenting the State's case. *Id.* at 78a-80a.

The district court also rejected Hrvol's and Richter's claims to qualified immunity. The court saw no reason why a prosecutor who manufactures evidence that he subsequently uses at trial would be immune under Section 1983, but a police officer who does the same would be liable. The district court noted that *Zahrey* v. *Coffey*, 221 F.3d 342 (2d Cir. 2000), perceived the same problem, and resolved it by holding that a prosecutor's fabrication

of evidence gives rise to Section 1983 liability, so long as the use of that evidence to commit a deprivation of liberty is reasonably foreseeable and the evidence is, in fact, so used. Pet. App. 107a-108a.

4. On interlocutory appeals from the denials of immunity, the court of appeals affirmed in relevant part. The court agreed with the district court that petitioners are not entitled to absolute immunity for actions taken before they had probable cause to arrest respondents. Pet. App. 11a-12a. As to qualified immunity, the court of appeals also embraced *Zahrey*, and held that petitioners violated respondents' "substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges." *Id.* at 19a. The court of appeals apparently agreed with the district court that this right was clearly established, summarily concluding that "[t]he district court was correct in denying qualified immunity to Hrvol and Richter for their acts before the filing of formal charges." *Ibid.*

SUMMARY OF ARGUMENT

I. This Court has interpreted Section 1983 to provide absolute immunity to prosecutors for activities "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976). The Court has done so because that immunity comports with the common law tradition and because the threat of liability could alter prosecutorial decisions and divert prosecutors' time and energy into defending civil suits instead of vindicating the criminal laws. *Id.* at 421-429.

If the allegations here are true, petitioners engaged in prosecutorial misconduct of an execrable sort, involving a complete breach of the public trust. But absolute immunity reflects a policy judgment that such conduct

is properly addressed not through civil liability, but through a host of other deterrents and punishments, including judicial oversight of criminal trials, and criminal and professional disciplinary proceedings against prosecutors. *Imbler*, 424 U.S. at 429. The Court has long held that, given these alternative tools, allowing criminal defendants to bring civil suits against prosecutors will produce few additional benefits and could cause serious harm.

What respondents seek here is, in every effect, a subversion of absolute prosecutorial immunity. To be sure, this Court has recognized that a prosecutor "neither is, nor should consider himself to be, an advocate"—and thus not absolutely immune—"before he has probable cause to have anyone arrested." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 274 (1993). But the Court has never said that a prosecutor can be liable for actions *at trial*, simply because they relate back to earlier conduct at the investigatory stage (*i.e.*, before probable cause is established). To do so would transform the absolute immunity of *Imbler* into little more than a pleading rule; plaintiffs barred under *Imbler* would simply draft their complaint to refer to the prosecutor's investigation and preparation of the case instead of his activity at trial.

II. Established law provides no support for finding prosecutors liable for alleged acts of fabrication at the investigatory stage. Courts agree that the act of fabrication, by itself, without any use of the evidence, is not a constitutional violation. Other constitutional torts, such as searches or seizures in violation of the Fourth Amendment, may be complete before trial, so a prosecutor could be liable for them. But to find a due process violation complete at the moment of fabrication would mean that any evidence generated by the government

anywhere (even if unused at trial) would give rise to a freestanding Section 1983 or *Bivens* suit. That holding would work a profound change in existing law.

Recognizing that difficulty, some courts have instead held liable the prosecutor who fabricates evidence because the fabrication can foreseeably result in the use of that evidence at trial to obtain a conviction. But this theory is also at odds with the Court's holdings. Section 1983 does not impose liability for all the foreseeable consequences of a state official's actions. The Constitution is not a "font of tort law," *Paul* v. *Davis*, 424 U.S. 693, 701 (1976), and this Court has rightly resisted such an unbounded reading of Section 1983. Instead, the Court has consistently looked to common law tort analogies to keep Section 1983 actions within proper bounds.

Those common law principles explain why prosecutors may not be held liable for fabricating evidence they introduce at trial, even though police officers who fabricate evidence may be held liable under Section 1983. The closest common law analogy here is malicious prosecution, which provides a remedy for the wrongful institution of criminal proceedings. The prosecutor is absolutely immune for that act. A police officer who fabricates evidence and supplies it for use at trial may be held liable at common law for the institution of proceedings, under a species of vicarious liability known as "procurement." But procurement has no application to prosecutors because they are already directly responsible—albeit immune—for the wrongful institution of proceedings and introduction of evidence there.

This is not mere formalism; it is an expression of longstanding and important policy. The common law limits of the malicious prosecution tort are the indispensable complement to the common law immunity of

prosecutors. Together, they provide the utmost protection to prosecutors in the performance of their official duties. And this strong common law protection is reflected in the Court's own precedents, which have consistently recognized the societal need for prosecutors to carry out their work "with courage and independence." *Imbler*, 424 U.S. at 423 (internal quotation marks and citation omitted).

Even with strong rules of prosecutorial immunity in place, injured parties retain several mechanisms for redress. Prosecutors may remain liable for any number of investigation-stage activities, as to which they enjoy only qualified immunity—for example, conducting searches and seizures that violate the Fourth Amendment. As noted above, police officers may be liable if they wrongfully procure criminal proceedings by supplying fabricated evidence that is used at trial to obtain a conviction. And on facts like those alleged here, a person who bears the title prosecutor, but who "perform[ed] [only] the investigative functions normally performed by a detective or police officer," *Buckley*, 509 U.S. at 273, would be liable. The exemption from liability in this case, although absolute, applies only to a discrete set of individuals for a discrete set of activities. That protection does no more than deliver on *Imbler*'s promise that prosecutors are absolutely immune from suit for bringing and presenting the State's case at trial.

Imbler's promise of absolute immunity becomes meaningless if any acquitted individual could pierce the prosecutor's protection by pleading that he was somehow involved in a pre-trial investigation. The common law has never recognized such a theory of liability, and because that theory would undermine the purposes of absolute prosecutorial immunity, the Court should not

do so now. If prosecutors are to be liable for their acts at trial, that result should be accomplished by Congress, and not read into either the longstanding statutory text of Section 1983 or the nonstatutory remedy that this Court implied in *Bivens*.

ARGUMENT

I. THIS COURT SHOULD REJECT RESPONDENTS' EFFORTS TO CIRCUMVENT ABSOLUTE IMMUNITY

By their own account, respondents' harm arose from the use of fabricated evidence at trial to convict them. In simplest terms, if that is the act that harmed respondents, and petitioners are immune for that act, then petitioners are not civilly liable to respondents. Even an unconscionable act of fabrication does not transform a prosecutor's acts at trial into a source of civil liability. As Judge Easterbrook observed on remand from this Court in *Buckley*, "*Obtaining* [a coerced] confession is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity." *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995).

Important public policies and common law traditions favor absolute prosecutorial immunity. Those same policies and traditions disfavor any artful attempt to evade that immunity.

A. The Use Of Fabricated Evidence Against A Criminal Defendant Violates The Defendant's Constitutional Rights, But A Prosecutor Is Absolutely Immune From Suit For Such Use

One potential theory of civil liability in this case—that petitioners' use of fabricated evidence at trial to

obtain convictions deprived respondents of their constitutional rights—fails because petitioners are absolutely immune.

The use of fabricated evidence against a criminal defendant "subjects [the defendant] to the deprivation of * * * rights * * * secured by the Constitution," 42 U.S.C. 1983. *E.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325, 326 n.1 (1983) ("knowing use of perjured testimony violates due process"); *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) ("perjured testimony, knowingly used by the State authorities to obtain [a] conviction" works "a deprivation of rights guaranteed by the Federal Constitution"). The United States can bring criminal charges against a prosecutor who knowingly presents such fabricated testimony, see 18 U.S.C. 242, or conspires with a witness or police officer to do so, see 18 U.S.C. 241.

A prosecutor, however, may receive absolute immunity from suit for acts violating the Constitution in order to advance important societal values. This Court's cases recognize a common law tradition of immunity that ensures that prosecutors are free to carry out their work "with courage and independence." *Imbler* v. *Pachtman*, 424 U.S. 409, 423 (1976) (internal quotation marks and citation omitted). Without a strict rule of immunity, "suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of some improper and malicious actions to the State's advocate." *Id.* at 425. Such suits raise the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. These suits are particularly vexing

because "allegations of [prosecutorial] misconduct are 'easy to allege and hard to disprove.'" *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (quoting *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004)). Moreover, they "often would require a virtual retrial of the criminal offense in a new forum." *Imbler*, 424 U.S. at 425. Absolute immunity inevitably includes wrongdoers within the scope of its protection because of the paramount need to achieve broad societal goals. In effect, the doctrine "reflects 'a balance' of 'evils'"—where the benefits of fearless prosecution outweigh the cost of immunizing wrongful conduct. *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 859 (2009) (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.), cert. denied, 339 U.S. 949 (1950)).

Under these principles, "prosecutors are absolutely immune from liability under [Section] 1983 for their conduct in 'initiating a prosecution and in presenting the State's case.'" *Burns* v. *Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler*, 424 U.S. at 431); see *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring) ("Insofar as [petitioner's false-evidence claims] are based on respondents' supposed knowing *use* of fabricated evidence[,] * * * immunity provides complete protection."). By virtue of this rule, petitioners have absolute immunity from civil suit for the use at trial of any evidence, and therefore cannot be held liable for their introduction at trial of allegedly fabricated evidence in this case.

B. *Imbler*'s Promise Of Absolute Prosecutorial Immunity Can Be Vindicated Only By Rejecting Respondents' Novel Theory Of Prosecutorial Liability

Absolute immunity would mean very little if, as respondents propose, they have a cause of action for the same harm (imprisonment on conviction), flowing from the same act (introduction of fabricated evidence), against the same defendant (the prosecutor), that would usually trigger immunity, so long as pled with the spotlight on an earlier action (the initial fabrication). The fundamental flaw with that approach is that it allows an allegation relating to the earlier action, which does not itself produce the harm complained of and could not itself form the basis of suit, to alter the result in the case. That would render prosecutorial immunity close to an empty shell, which plaintiffs would take into account only for the purpose of pleading around it. As Justice Kennedy observed in *Buckley*, a prosecutor would not be able to invoke absolute immunity if "the claimant is clever enough to include some actions taken by the prosecutor prior to the initiation of prosecution." 509 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part). That is precisely what respondents have done here to powerful effect, even though the earlier actions cannot give rise to liability and so are not the gravamen of their complaints.

In the analogous context of considering claims of qualified immunity, this Court has emphatically rejected attempts at artful pleading to evade the "balance that [the Court's] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (quoting *Davis* v.

Scherer, 468 U.S. 183, 195 (1984)). Here, delivering on the promise of *Imbler* requires rejecting respondents' attempts to plead around absolute immunity. The "vigorous and fearless performance of the prosecutor's duty," *Imbler*, 424 U.S. at 427, would be impossible if that immunity could be evaded so easily. In any case in which a prosecutor was involved in an investigation—for example, in interviews of witnesses—he might at trial be "hampered in exercising [his] judgment as to the use of such witnesses by concern about resulting personal liability." *Id.* at 426. And conversely, he might be deterred from becoming involved in pre-trial investigation in the first instance lest that involvement, coupled with the fear of liability, distort his judgments about what evidence to use at trial. The rule respondents seek would undermine *Imbler*'s protections and threaten to undermine, in just the way that decision sought to avoid, the effectiveness and integrity of criminal investigations and trials.

Critical to this analysis is that respondents have no cause of action for the non-immunized (wholly pre-trial) conduct of fabrication that their complaints allege. See pp. 13-33, *infra*. Section 1983 absolute immunity doctrine presupposes that some acts need not be immunized because they do not give rise to liability in the first instance. See, *e.g.*, *Buckley*, 509 U.S. at 275 n.5 (warning against "conflat[ing] the question whether a [Section] 1983 plaintiff has stated a cause of action with the question whether the defendant is entitled to absolute immunity for his actions").[2] Complaints based on such acts

[2] The difference between the immunity question and the cause-of-action question is also evident in *Kalina* v. *Fletcher*, 522 U.S. 118 (1997). There, the Court held that a prosecutor has only qualified immunity for swearing a false affidavit supporting an arrest warrant application—the

fail to state a claim—or, if they are really about other acts that would give rise to a claim but are immunized, the complaints should be dismissed on that basis. That is the case here. Respondents could not omit from a well-pleaded complaint an allegation that the fabricated evidence was introduced at trial to obtain their convictions; that fact is essential to show the causal connection between the fabrication and the actual harm they suffered, which was imprisonment on conviction. But respondents are absolutely immune for that critical act of introducing the evidence. If *Imbler* is to have any force, it must be read to exempt prosecutors from liability in such a situation, when the substance of the claim rests on an immune act, regardless of how artful the complaint is in avoiding its mention.[3]

II. PETITIONERS ARE NOT LIABLE UNDER SECTION 1983 FOR FABRICATION OF EVIDENCE BEFORE TRIAL

The decision below rested on one of two possible theories, but was vague as to which one it employed. It

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Court did not hold that there is a Section 1983 cause of action against the prosecutor for that act.

[3] A complaint is also subject to Federal Rule of Civil Procedure 8, which demands that it "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). However the Court decides this case, *Iqbal* should ensure the dismissal of complaints that "do not permit the court to infer more than the mere possibility of misconduct," *id.* at 1950. But that protection is no substitute for a proper interpretation of Section 1983 that prevents plaintiffs from circumventing prosecutorial immunity. Some plaintiffs will succeed in meeting the pleading standard; and in any event, this Court has never suggested that pleading requirements are an adequate substitute for categorical exemption from liability.

stated its holding as "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges." Pet. App. 19a. This statement suggests that the Court found a violation of Section 1983 based solely on petitioners' pre-trial conduct. Yet the opinion below also relied on *Zahrey* v. *Coffey*, 221 F.3d 342 (2d Cir. 2000), which reasoned instead that the reasonably foreseeable causal connection between fabrication of evidence and its use at trial is a sufficient basis for imposing liability on a prosecutor. See Pet. App. 18a (liability is appropriate "provided that the deprivation of liberty . . . can be shown to be the result of [the prosecutor's] fabrication") (quoting *Zahrey*, 221 F.3d at 344, 349) (brackets in original).

Neither theory is sound. Courts have never recognized a freestanding due process right against fabrication of evidence. A defendant's due process right relating to fabrication kicks in only at trial, when such evidence is introduced in court. So, too, *Zahrey*'s foreseeability reasoning would profoundly alter existing law. That theory would import into Section 1983, in an entirely novel way, generalized notions of causation. At the same time, it would disregard specific common law doctrine relevant to the question—namely the tort of malicious prosecution and its limits.

A. Fabrication Of Evidence During An Investigation Does Not, By Itself, Violate The Constitution

The first step in an immunity case under Section 1983 is to identify the constitutional right allegedly infringed. *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979). Here, petitioners' fabrication of evidence, by

itself, cannot be the constitutional violation on which liability is based.

1. Courts broadly agree that fabrication of evidence, standing alone, does not violate any constitutional right of a criminal defendant (regardless whether it may violate someone else's). See, *e.g.*, *Michaels* v. *New Jersey*, 222 F.3d 118, 123 (3d Cir. 2000), cert. denied, 531 U.S. 1118 (2001); *Zahrey*, 221 F.3d at 348 ("The manufacture of false evidence, 'in and of itself,' * * * does not impair anyone's liberty, and therefore does not impair anyone's constitutional right.") (citation omitted); *Buckley*, 20 F.3d at 794-795 (Easterbrook, J.) ("Coercing witnesses to speak * * * is a genuine constitutional wrong, but the persons aggrieved would be [the coerced witnesses] rather than Buckley. * * * *Obtaining* the confession [from other people] is not covered by immunity but does not violate any of Buckley's rights."); *Landrigan* v. *City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980) ("[W]e do not see how the existence of a false police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws."). Cf. *Hartman*, 547 U.S. at 262 n.9 ("No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort.").

Although *Buckley*, 509 U.S. at 272, reserved the question, every Member of this Court suggested that the distinction between the preparation and the use at trial of fabricated evidence has constitutional significance. "I am aware of[] no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Id.* at 281 (Scalia, J., concurring); see *id.* at 271-272 ("The location

of the injury [as between trial and investigation] may be relevant to the question whether a complaint has adequately alleged a cause of action for damages."); *id.* at 275 n.5 (same); *id.* at 285 (Kennedy, J., concurring in part and dissenting in part) ("Indeed, it appears that the only constitutional violations these actions are alleged to have caused occurred within the judicial process."). This view accords with this Court's understanding of other trial rights. For example, "[s]tatements compelled by police interrogations of course may not be used against a defendant at trial, * * * but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs." *Chavez* v. *Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion); see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

2. Contradicting these authorities, the court of appeals held that "a County Attorney * * * violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence *before* filing formal charges." Pet. App. 19a (emphasis added). This Court has been "reluctant to expand the concept of substantive due process," *Collins* v. *City of Harker Heights*, 503 U.S. 115, 125 (1992), and the right articulated by the court of appeals cannot be squared with this Court's jurisprudence.

The Due Process Clause states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1; accord *id.*, Amend. V. A due process violation requires, *inter alia*, a cognizable deprivation of life, liberty, or property. Absent such a deprivation, there is no violation. See, *e.g.*, *District Attorney's Office* v. *Osborne*, 129 S. Ct. 2308, 2319 (2009). When a state actor merely fabricates evidence—without putting that evidence to

use in any way—the requisite deprivation of life, liberty, or property is missing. And even if some deprivation were found, a right against unused fabricated evidence does not have a sufficiently "long history" of recognition, and is not "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 2322, 2320 (quoting *Medina* v. *California*, 505 U.S. 437, 446 (1992)). Similarly, the mere creation of false evidence—assuming it sits unused in some police file or government archive—is hardly conduct that "shocks the conscience." See *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846-850 (1998).[4]

Indeed, because the decision below does not rely on any particular use of false evidence, it appears to go far toward constitutionalizing simple precepts of honest public record-keeping. Every police or investigatory report, even though filed away without further action, could rise to the level of a constitutional injury upon a showing that some information in the report was knowingly false, or that public officials had failed to correct it on demand. The cause of action would lie even though the inaccuracies resulted in no concrete harm or, if the false records were released, only a generalized reputational injury. Yet this Court has long held that such inchoate interests are "neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Paul* v. *Davis*, 424 U.S. 693, 712 (1976).

The novel pre-trial right that the court of appeals posited finds no support in previously recognized consti-

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[4] Although mere fabrication of evidence, without more, does not violate the Constitution, and therefore could not be prosecuted under 18 U.S.C. 242, it may support a prosecution under 18 U.S.C. 241 if the prosecutor conspired to use the fabricated evidence to injure another person in violation of the Constitution.

tutional rights applying to criminal investigations. One such right arises from the Fourth Amendment, whose violation—an arrest or search without probable cause—usually is complete before trial. See *Wallace* v. *Kato*, 549 U.S. 384, 390 n.3 (2007). Thus, a prosecutor committing such a violation at the investigatory stage would be liable under Section 1983, subject only to a defense of qualified immunity. See *Buckley*, 509 U.S. at 273. But the mere fabrication of evidence is not a Fourth Amendment violation, because an act of fabrication is not a search or seizure. See *California* v. *Hodari D.*, 499 U.S. 621 (1991). Neither is the fabrication of evidence assimilable to any other known pre-trial constitutional violation. Because this is so, regardless of the identity of the defendant, any recovery by respondents under Section 1983 must be for a harm suffered at a later stage of their prosecution, when the fabricated evidence was used against them at trial.

B. Generalized Notions Of Foreseeability Provide No Basis For Section 1983 Liability For Fabrication Of Evidence

Rather than finding a complete constitutional deprivation before trial, *Zahrey* based Section 1983 liability on the reasonable foreseeability that fabricated evidence will be used at trial to obtain a conviction. 221 F.3d at 351-354. The court reasoned "that [S]ection 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" *Id.* at 349-350 (quoting *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961)).

Zahrey's "reasonable foreseeability" principle is wrong for at least three reasons. *First*, *Zahrey* reads too much into this Court's statement in *Monroe*. That observation was offered to suggest that Section 1983

carries no scienter requirement.[5] This feature was relevant in *Monroe* to distinguish Section 1983 from 18 U.S.C. 242: both concern the deprivation of constitutional rights under color of law, but unlike Section 1983, 18 U.S.C. 242 reaches only "willful[]" deprivations of rights. The Court's rejection of a scienter requirement says nothing about causation of the kind on which the Second Circuit relied, and certainly does not imply a freewheeling "reasonably foreseeable" standard applicable to all Section 1983 cases.

Second, this Court has squarely rejected a reading of the Due Process Clause that makes state actors liable for all foreseeable consequences of their actions. See *Martinez* v. *California*, 444 U.S. 277, 284-285 (1980) (parolee's killing of plaintiff's decedent not state action "[r]egardless of whether * * * the state parole board could be said either to have had a 'duty' to avoid harm to his victim or to have proximately caused [plaintiff's decedent's] death") (citing *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339 (1928)). A rule of mere foreseeability would effectively convert the Constitution and Section 1983 into the "font of tort law," *Paul*, 424 U.S. at 701, that this Court has long resisted. See, *e.g.*, *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution * * * does not purport to supplant traditional tort law

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[5] Notably, the Court has limited even this aspect of *Monroe* in cases like *Daniels* v. *Williams*, 474 U.S. 327 (1986) (negligent deprivations of life, liberty, or property do not violate the Due Process Clause), *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (only deliberate indifference to serious medical needs, and not negligence such as the mere failure to provide medical care, implicates Eighth Amendment prohibition against cruel and unusual punishments), and *Brower* v. *County of Inyo*, 489 U.S. 593, 596 (1989) (only intentional conduct rises to the level of a seizure under the Fourth Amendment).

in laying down rules of conduct to regulate liability for injuries that attend living together in society.").

Third, even if *Zahrey* were correct that Section 1983 sometimes incorporates a general tort rule of proximate causation, the cause of action here is informed by the more specific parameters of the common law tort of malicious prosecution, as discussed below. Indeed, the common law expressly rejects ordinary causation principles in describing procurement, which is the kind of malicious prosecution relevant here. See p. 25, *infra* (quoting Restatement (Second) of Torts § 653 cmt. d (1977) (Restatement)). The more specific rule of the common law supersedes any general background principle of proximate causation.

C. A Prosecutor Who Is Immune From Suit For Use Of Fabricated Evidence At Trial Is Not Liable Under Section 1983 For Fabrication Of That Evidence Before Trial

Both *Zahrey* and the decision below began with the premise that a police officer who fabricates evidence may be liable under Section 1983 when that evidence is later used "to procure a conviction." Pet. App. 18a (citation omitted); see *Zahrey*, 221 F.3d at 351-352. From there, both courts reasoned that it would be "perverse" to hold that a prosecutor who engages in the identical fabrication could nonetheless be free from liability. Pet. App. 18a; see *Zahrey*, 221 F.3d at 353.

Both courts of appeals misunderstood why and when a police officer who fabricates is liable. A fabricating officer is liable under Section 1983 under a form of vicarious liability. As discussed above, he is not liable because the fabrication itself is a constitutional violation. Neither is he liable because the fabrication may foreseeably be used to secure a conviction. He is liable because

the introduction of the fabricated evidence at trial is a constitutional violation, and even though he personally did not commit this violation, his earlier act of fabrication was its animating force. That connection—between the initial fabrication and the subsequent corruption of criminal proceedings—makes him an appropriate person to bear responsibility.

This is precisely the logic of the common law in holding liable a person who wrongfully procures the institution of criminal proceedings—a species of the tort of malicious prosecution. Liability for procurement is not predicated on the simple act of fabricating the evidence; if there were no subsequent use of the evidence, there would be no liability. Liability for procurement arises from the later use of the evidence—even though the procurer himself only has fabricated the evidence, and has not used it. Once again, the liability is vicarious: The common law treats the fabricator as responsible for the subsequent use of the evidence because his fabrication "procured" the criminal proceedings in the first instance. Section 1983 liability for a fabricating police officer works in just the same way.

This explanation of the common law reveals why the court of appeals' reasoning—of simply substituting the fabricating prosecutor in place of the fabricating officer—must fail. The procurement theory cannot be at issue in this case, because the prosecutor *did* introduce the evidence—and is absolutely immune from suit for doing so. It is both a misuse of language and a misunderstanding of doctrine to speak of a prosecutor procuring his own institution of proceedings; he in fact initiated the proceedings, rather than procuring them. Everyone agrees the prosecutor is immune for this initiation of proceedings. To impose a form of vicarious liability for

it, when the law chooses not to impose direct liability, would be anomalous.

1. Common law malicious prosecution informs an action brought under Section 1983 seeking damages for unconstitutional confinement imposed pursuant to legal process

This Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability." *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994) (quoting *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 305 (1986)). The specific rules of the common law define the reach of that tort liability.

> "[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under [Section] 1983 as well."

Ibid. (first set of brackets in original) (quoting *Carey* v. *Piphus*, 435 U.S. 247, 257-258 (1978)). This court has "reemphasize[d] that [its] role is to interpret the intent of Congress in enacting [Section] 1983, not to make a freewheeling policy choice, and that [it is] guided in interpreting Congress' intent by common-law tradition." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986).

In *Heck*, the plaintiff, who was confined following a criminal conviction, alleged that the state police investigator and county prosecutors handling his case "had engaged in an unlawful, unreasonable, and arbitrary investigation leading to [his] arrest; knowingly destroyed evidence which was exculpatory * * *; and

caused an illegal and unlawful voice identification procedure to be used at [his] trial." 512 U.S. at 479 (internal quotation marks omitted). Heck sought money damages for his allegedly wrongful imprisonment. *Ibid.*

Aside from the factual particulars of the allegations, respondents' legal claims under Section 1983 are indistinguishable from Heck's. Thus, as in *Heck*, "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because * * * it permits damages for confinement imposed pursuant to legal process." 512 U.S. at 484.

This Court has likewise looked to the common law of malicious prosecution in recognizing immunities in cases seeking damages for allegedly unconstitutional confinement pursuant to legal process. For example, in *Malley*, the Court held that an officer is not absolutely immune under Section 1983 for presenting an insufficient affidavit to a judicial officer who issued a warrant resulting in the plaintiff's arrest. The Court implied that the police officer "could be held liable," *Malley*, 475 U.S. at 340, and referred to nineteenth century common law malicious prosecution cases, see *id.* at 341 n.3. See also *Kalina*, 522 U.S. at 124 & n.11 (noting that *Imbler* "rel[ied] on common-law decisions providing prosecutors with absolute immunity from tort actions based on claims that the decision to prosecute was malicious and unsupported by probable cause" and "drew guidance from * * * the first American cases addressing the availability of malicious prosecution actions against public prosecutors").

2. By analogy to common law malicious prosecution, a police officer who fabricates evidence may be liable for deprivation of a criminal defendant's constitutional rights when the evidence is used at trial

The core concern of the tort of malicious prosecution is that criminal prosecution not be wrongfully coopted and put to improper ends. Because that is so, the central event for the tort is the institution of criminal proceedings. Restatement § 654. Under the common law, a person may be liable for malicious prosecution if, *inter alia*, he either "*initiates* or *procures* the institution of criminal proceedings" against another. *Id.* § 653 (emphasis added). In other words, a malicious prosecution claim can proceed on a theory of primary liability (initiation) or vicarious liability (procurement).

a. Generally, a person "initiates" criminal proceedings if he "mak[es] a charge before a public official or body in such form as to require the official or body to determine whether process shall or shall not be issued against the accused." Restatement § 653 cmt. c. That cannot be the basis for Section 1983 liability here because such initiating acts, when undertaken by a prosecutor, are afforded absolute immunity. See *Imbler*, *supra*; *Kalina*, *supra*. By contrast, a police officer who applies for and obtains a warrant by swearing out a false or insufficient affidavit may be liable for wrongful initiation. See *Malley*, 475 U.S. 240-241 & n.3; Restatement § 653 cmt. c ("[O]ne who * * * presents to a magistrate a sworn charge upon which a warrant of arrest is issued, initiates the criminal proceedings of which the issuance of a warrant is the institution.").

b. A person can also be liable for malicious prosecution by "procuring" criminal proceedings. There, "[i]t is

not necessary to liability * * * that the defendant personally or through an agent shall have made the formal charge upon which the proceedings were instituted. It is enough that he has induced a third person"—often the prosecutor—"to make the charge." Restatement § 653 cmt. f. The procurement theory recognizes that persons other than the formal initiator may bear responsibility for a prosecution. Cf. *Perdu* v. *Connerly*, 24 S.C.L. (Rice) 48, 52 (1838) (malicious prosecution action) ("The defendant is liable for [a third party's] act, as done by his procurement; for, in trespass, all who are concerned in any way are principals."). It is on this theory that a fabricating officer may be liable for the deprivation of liberty caused by a conviction obtained with his fabricated evidence.

The standard requirements for procurement, however, are stricter than simple foreseeability:

> It is, however, not enough that some act of his should have caused the third person to initiate the proceedings. * * * The giving of the information or the making of the accusation * * * does not constitute a procurement of the proceedings that the third person initiates if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit.

Restatement § 653 cmt. d; see *id.*, cmt. g.[6]

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[6] The procurement theory may therefore require a certain relationship between the procuring party and the instituting party. For example, the courts of appeals have most often invoked a procurement theory of liability when a police officer dupes the prosecutor by supplying fabricated evidence, while concealing the fabrication. See p. 26, *infra* (citing cases). Likewise, the Restatement suggests coercion of the prosecutor would support a procurement theory of liability. See Restatement § 653 cmt. g & ill. 4. A conspiracy between officer and

Once a person is found to have procured the criminal proceedings, that person is liable as if he himself initiated those proceedings. "[O]ne who procures a third person to institute criminal proceedings against another is liable under the same conditions *as though he had himself initiated the proceedings.*" Restatement § 653 cmt. d (emphasis added). Colloquially speaking, the procurer stands in the shoes of the initiator.

Thus, lower courts have held that a police officer who, without the prosecutor's knowledge, fabricates evidence may be held liable under Section 1983 because, by analogy to malicious prosecution law, the officer has procured the liberty deprivation. See, *e.g.*, *Senra* v. *Cunningham*, 9 F.3d 168, 174 (1st Cir. 1993); *Barts* v. *Joyner*, 865 F.2d 1187, 1195 (11th Cir.), cert. denied, 493 U.S. 831 (1989); *Jones* v. *City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988); *Smiddy* v. *Varney*, 665 F.2d 261, 266 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982).[7] In effect, the police officer stands in the shoes of the prosecutor.

White v. *Frank*, 855 F.2d 956 (2d Cir. 1988), offers a particularly careful application of these principles. There, the court of appeals considered whether the defendant police officers could be liable under Section 1983 for perjury before a grand jury, which resulted in the plaintiff's indictment, arrest, prosecution, and conviction. The court held that officers were absolutely im-

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prosecutor may also support a procurement theory of officer liability, as may anything that makes "an intelligent exercise of the [prosecutor's] discretion * * * impossible," *id.* cmt. g.

[7] These cases and others exhibit some diversity of opinion on the particular circumstances justifying liability of fabricating officers. Because the police who investigated respondents are not parties here, the Court need not confront those issues.

mune from liability for the act of testifying falsely in a judicial proceeding—an act of fabrication—because at common law, their false statements would have been absolutely privileged. *Id.* at 958-959 (citing *Briscoe*, *supra*). But, the court continued, officers could be held liable at common law for presenting false statements to a grand jury considering whether to return an indictment. There, the law provided an entirely separate "cause[] of action"—to wit, "an action for malicious prosecution," on which the officers might be "liable for [their] role in *initiating* a baseless prosecution." *Id.* at 959; see *id.* at 961; see also *Kalina*, 522 U.S. at 133-134 (Scalia, J., concurring) (employing similar analysis). For that reason, *White* imposed Section 1983 liability.

In short, a police officer who fabricates evidence is not liable under Section 1983 for the conduct of fabricating the evidence itself (*e.g.*, suborning perjury or testifying falsely). Rather, the fabricating officer may be liable for his role in instituting wrongful proceedings, including the presentation of false evidence to the prosecutor for use at trial. This is so even though he plays no role in actually introducing that evidence at trial, because procuring the prosecution with the fabricated evidence itself justifies holding him liable.

c. Before this case, the Court's closest encounter with the procurement theory of liability in a Section 1983 or *Bivens* case occurred in *Hartman*, *supra*, where the plaintiff sought to hold investigators liable for a retaliatory prosecution. The Court first noted that a "*Bivens* (or [Section] 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute." *Hartman*, 547 U.S. at 261-262 (citing *Imbler*, *supra*). Rather, in *Hartman*, "the defendant [was] a

nonprosecutor * * * who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. In that situation, the Court explained, "the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute," *ibid.*, which the Restatement labels "procurement" in the context of malicious prosecution.

This Court not only recognized in *Hartman* that procurement was the operative theory, but also fashioned a test virtually identical to that of the Restatement. Compare *Hartman*, 547 U.S. at 262 (plaintiff "must show that the nonprosecuting official * * * induced the prosecutor to bring charges that would not have been initiated without his urging"), with Restatement § 653 cmt. g ("In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution."). *Hartman* thus supports analyzing liability for fabricating police officers under Section 1983 by analogy to common law actions for procuring wrongful prosecutions.

3. By analogy to common law malicious prosecution, a prosecutor who fabricates evidence and introduces it at trial is not liable under Section 1983

Once the common law backdrop is understood, the distinction between a fabricating police officer and a fabricating prosecutor becomes evident. Contrary to the court of appeals' view, the one cannot be substituted for the other. That is because the wrongful act at common law is instituting proceedings based on fabricated evi-

dence. While the fabricating officer may be vicariously liable for that act, the prosecutor is always immune for it.

a. By analogy to common law malicious prosecution, a fabricating officer may be held liable on an "initiation" or "procurement" theory—and if petitioners are liable, it likewise must be on one of these theories. But this extrapolation, from officer to prosecutor, cannot be accomplished. Liability on an initiation theory cannot translate to the prosecutor, because he is absolutely immune for initiating a prosecution. And the procurement theory fares no better. As suggested above, procurement liability for malicious prosecution exists to assign liability to a blameworthy person for wrongful institution of a proceeding actually performed by another. The theory is irrelevant when the blameworthy person and the initiator of the proceeding are one and the same.[8] Here, the initiator—the trial prosecutor—is the only person responsible for the wrongful act of proceeding with a corrupt case: to use an earlier metaphor, the prosecutor *already* stands in his own shoes.

Or to put the point in another way, the procurement theory is a tool for assigning liability to non-prosecutors—not a theory (as respondents would have it) for creating liability for prosecutors. As to prosecutors, the responsibility for the wrongful conduct is already clear —but so too is the absolute immunity for it. Indeed, the initiation of a wrongful action, of which fabrication of evidence is a simple component, is the prototypical con-

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[8] Similarly, none of the relationships between police officer and prosecutor that justify procurement liability, see note 6, *supra*, can exist when the prosecutor both fabricates and introduces the evidence. A person acting alone cannot dupe himself, coerce himself, conspire with himself, or impair his own discretion.

duct for which prosecutors receive protection. See *Dellums* v. *Powell*, 660 F.2d 802, 806 (D.C. Cir. 1981) ("Never has a prosecutorial official been held liable for causing a prosecution to be brought" even based on "actions taken in an administrative or investigative capacity.").

b. This is exactly the result reached in *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926), aff'd, 275 U.S. 503 (1927) (per curiam), which this Court summarily affirmed and has repeatedly cited with approval. See *Imbler*, 424 U.S. at 422, 424; *Butz* v. *Economou*, 438 U.S. 478, 509-510 (1978); *Burns*, 500 U.S. at 490. In *Yaselli*, the plaintiff brought a malicious prosecution claim against a Special Assistant to the Attorney General, alleging that the prosecutor had obtained the indictment against him by presenting false evidence to the grand jury. The court of appeals held that the prosecutor was absolutely immune. But the court went on to address plaintiff's "novel question, which ha[d] not * * * before been presented to the courts": Whether the prosecutor could be held liable instead for conspiring to be appointed a Special Assistant in order to prosecute the plaintiff without probable cause. *Yaselli*, 12 F.2d at 406. *Yaselli* rejected the earlier conspiracy as irrelevant, and explained that "[t]he important fact is that * * * having been appointed, the public interests require that he shall be free and fearless to act in the discharge of his official duties." *Id.* at 407. The same logic applies in this case: All the wrongful conduct is of a single piece—the wrongful institution and conduct of a criminal proceeding—for which the prosecutor is absolutely immune.

Yaselli's refusal (see 12 F.2d at 407) to follow *Stewart* v. *Cooley*, 23 Minn. 347 (1877), is particularly relevant. *Stewart* had suggested that a judge who procured

a prosecution that came before his own court could not invoke judicial immunity against an action for malicious prosecution. The *Stewart* court reasoned that "such a conspiracy, previously formed * * * would subject all the parties engaged in it to liability" because "[t]he act of entering into such an agreement was not done in the course of any judicial proceeding, or in the discharge of any judicial function or duty." *Id.* at 351. Plaintiff's counsel in *Yaselli* pointed to *Stewart* for the proposition that "a wrongdoer cannot become immune by the successful accomplishment of part of the wrong which enables him to do the rest." 12 F.2d at 407. That counsel's argument, and the reasoning in *Stewart*, are precisely the mistaken views adopted by *Zahrey* and respondents here. *Yaselli* rejected that procurement-based argument because the relevant "wrongful act on the part of the judge"—that is, the act on which tort liability is predicated—"consisted in the issuing of process," an act for which there is absolute immunity. *Ibid.* (quoting 2 Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independently of Contract* 801 n.23 (3d ed. 1906)). Much the same is true of this case, where the prosecutor's pre-trial fabrication is part and parcel of the wrongful initiation of proceedings on which tort liability is predicated—and for which the prosecutor is absolutely immune.

D. Imposing Section 1983 Liability On Prosecutors Is Unwarranted On Policy Grounds Because Criminal Defendants Have Alternative Civil Remedies And Adequate Safeguards Exist Against Prosecutors' Illegal Behavior

If the allegations in this suit are true, petitioners' efforts to convict respondents constitute a reprehensible breach of public trust. But providing absolute immunity

in such a case will not "leave the public powerless to deter misconduct or to punish that which occurs." *Imbler*, 424 U.S. at 429. Prosecutions under 18 U.S.C. 242, "the criminal analog of [Section] 1983," can punish wrongdoers, as can prosecutions for perjury. *Imbler*, 424 U.S. at 429. Furthermore, rigorous discipline by the bar association is a potent tool for ensuring that prosecutors live up to the responsibilities of their office. See *id.* at 429 & n.30. Indeed, the "prosecutor stands perhaps unique * * * in his amenability to professional discipline." *Id.* at 429. Criminal defendants are likewise protected by "'[t]he safeguards built into the judicial system'" as a "check on prosecutorial actions." *Burns*, 500 U.S. at 492 (quoting *Butz*, 438 U.S. at 512). See generally Gov't Br. at 31-33, *Van de Kamp*, *supra* (No. 07-854) (discussing safeguards).

Providing absolute prosecutorial immunity in this case also will not mean that respondents, or those in their position, are without a civil remedy. A police officer who fabricates evidence introduced at trial may be liable under Section 1983. Likewise, a "prosecutor" who "perform[ed] [only] the investigative functions normally performed by a detective or police officer," *Buckley*, 509 U.S. at 273, would be liable on the same facts. See pp. 24-28, *supra*. Both prosecutors and police officers, moreover, may be liable under various state tort law theories (*e.g.*, intentional infliction of emotional distress, negligence) if they were acting outside the scope of their employment. See, *e.g.*, Pet. App. 16a (remanding for further proceedings on such a claim). Similarly, a State may waive sovereign immunity under a state tort claims act for actions taken within the scope of a state official's

employment.[9] In addition, a wrongfully convicted criminal defendant who is later exonerated may have a statutory right of compensation.[10]

Consequently, a decision favoring petitioners would hardly ever deny any recovery to a wronged party. By contrast, a decision favoring respondents, by allowing their cause of action, would undo absolute immunity doctrine, with untold social costs. In the exceedingly rare case in which provable wrongdoing by a prosecutor is left uncompensated, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Imbler*, 424 U.S. at 428 (quoting *Gregoire*, 177 F.2d at 581 (L. Hand, J.)).

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[9] Iowa bars all malicious prosecution claims against state employees acting within the scope of their employment. Iowa Code Ann. § 669.14.5 (West 1998). By contrast, the Federal Tort Claims Act waives sovereign immunity for malicious prosecution claims against investigative and law enforcement officers of the United States. See 28 U.S.C. 2680(h).

[10] See 28 U.S.C. 1495, 2513; Ala. Code § 29-2-156 (2003); Cal. Penal Code § 4904 (2000); 735 Ill. Comp. Stat. Ann. 5/2-702 (West Supp. 2009); 705 Ill. Comp. Stat. Ann. 505/8 (West 2007); Iowa Code Ann. § 663A.1 (West 1998); La. Rev. Stat. Ann. § 15:572.8 (West 2005); Maine Rev. Stat. Ann. tit. 14, § 8241 (West 2003); N.J. Stat. Ann. § 52:4C-1 (West 2001); Ohio Rev. Code Ann. § 2743.48 (West 2000); Okla. Stat. Ann. tit. 51, § 154.B (West 2008); Tex. Civ. Prac. & Rem. Code Ann. § 103.001 (Vernon 2005); Va. Code Ann. § 8.01-195.11 (West 2009); Wis. Stat. Ann. § 775.05 (West 2009).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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No. 08-1065

IN THE
SUPREME COURT OF THE UNITED STATES

POTTAWATTAMIE COUNTY, IOWA, JOSEPH HRVOL, AND DAVID RICHTER,

Petitioners,

v.

TERRY J. HARRINGTON AND CURTIS W. MCGHEE, JR.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF BLACK COPS AGAINST POLICE BRUTALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The issue in this case is whether, in an action brought under 42 U.S.C. § 1983, prosecutors who fabricated and concealed evidence during an investigation of plaintiffs they knew to be innocent, have absolute, rather than qualified, immunity because they later represented the state in formal proceedings in which the plaintiffs were unjustly convicted and at which the fabricated evidence was introduced.

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INTEREST OF AMICUS CURIAE

Black Cops Against Police Brutality (BCAP) is an organization dedicated to ensuring that the rights of all citizens are not abridged by the police, especially in urban America, and to ensuring that people of color are afforded equal rights under the Constitution. BCAP's website is *available online at* http://www.b-cap.org/. BCAP takes a particular interest in opposing racial profiling and police use of excessive force, especially against persons of color, and is more generally concerned with any racial unfairness in the administration of justice.[1] The parties have consented to the filing of this Brief.

STATEMENT OF THE CASE

The facts are set out in detail in the District Court's opinion below. *McGhee v. Pottawattamie Cty., IA,* 475 F. Supp. 2d 862 (S.D. Iowa 2007). Given the procedural posture of the case, *see id.* at 867 n.1 & 878-80, our summary here will assume the truth of the allegations. As pertinent here, Terry Harrington and Curtis McGhee brought suit against prosecutors and police officers who fabricated, coerced, and concealed evidence to frame them for the murder of John Schweer. Schweer, a recently retired police captain employed by three car dealerships as a security guard, was killed by a shotgun blast in the early morning hours of July 22, 1977. *Id.* at 868. The

[1] No counsel for any party has authored this Brief in whole or in part and no person or entity, other than amicus curiae, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of the Brief.

complaints include counts brought under 42 U.S.C. § 1983 as well as other claims. Among the defendants were David Richter, then county attorney with jurisdiction over the murder, and Joseph Hrvol, an assistant state's attorney directly involved in the investigation into Schweer's murder.

In 1978, respondents Terry Harrington and Curtis McGhee were convicted of the murder, after separate trials, each receiving a sentence of life imprisonment without parole. *Id.* at 874. These convictions were upheld on appeal. In 1999, exculpatory evidence surfaced in the form of police reports strongly suggesting the guilt of another suspect. *Id.* This evidence had been withheld illegally, and, based on the *Brady* violations, the Iowa Supreme Court reversed Harrington's conviction. *Id.* The state at first attempted to retry Harrington, but gave up the effort in 2003 after the star prosecution witness, Kevin Hughes, a/k/a Kevin Mack, an alleged accomplice turned state's witness, recanted his former testimony. *Id.* at 875. McGhee agreed to enter an *Alford* plea in exchange for a sentence of time served. *Id.* at 876-77. Thus, both respondents in this case served twenty-five years in prison.

Defendants, individually and collectively, fabricated evidence against plaintiffs and concealed exculpatory evidence. In particular, plaintiffs claim that defendants suborned the perjury of Hughes by threats, going so far as to coach his perjury by altering details to fit incontrovertible facts. *Id.* at 870. The complaints also paint a broader picture of

deliberate prosecutorial misconduct, summarized by the District Court as follows:

> In essence, each of the asserted claims allege that the prosecutors Hrvol, Richter, and Wilber improperly concealed exculpatory evidence; concealed the alleged coercion of witnesses; participated in court proceedings; coerced witnesses; participated in the Schweer murder investigation; and conspired with the respective police defendants to commit the alleged misdeeds against the Plaintiffs.

Id. at 880-81.

Defendants Richter and Hrvol, petitioners here, sought summary judgment based on the absolute prosecutorial immunity recognized in *Imbler v. Pachtman,* 424 U.S. 409 (1976). Applying the functional test of *Buckley v. Fitzsimmons,* 509 U.S. 259 (1993), the district court granted the motion with respect to *Brady* violations by the prosecutors after the filing of the True Information on February 17, 1978, even though, given defendants' knowledge that the case against McGhee and Harrington was a web of falsehoods, reasonable jurors might still have found probable cause to be lacking. 475 F. Supp. 2d at 892. The court denied the motion with respect to prosecutorial misconduct before the filing of the True Information, *id.* at 893-94, including liability for conspiracy under 42 U.S.C. § 1985, *id.* at 898. Thus, defendants Richter and Hrvol had only qualified immunity with respect to claims based on Richter's supervision of the investigation, and in Hrvol's

pervasive participation therein, including personally badgering Hughes into perjury and tailoring the story to be told at trial. *Id.* at 894-95 ("Because Defendants have fundamentally admitted that they coached and coerced witnesses and fabricated evidence, the prosecutors have utterly failed to carry their burden to show that such acts were 'intimately associated with the judicial process' such that they are entitled to absolute immunity."). The court then rejected defendants' motion based on qualified immunity, finding that fabricating evidence violated plaintiffs' due process rights in violation of clearly established law. *See id.* at 903-10.

Defendants Richter and Hrvol took an interlocutory appeal from the partial denial of their summary judgment motion. Relying on the Seventh Circuit's decision on remand in *Buckley, see Buckley v. Fitzsimmons,* 20 F.3d 789 (7th Cir. 1994), they argued that fabrication of evidence as such does not violate the targets' constitutional rights, and that use of the evidence at trial is protected by absolute immunity under *Imbler.* The Eighth Circuit Court of Appeals unanimously and tersely rejected any argument for either absolute or qualified immunity for the fabrication of evidence, relying on *Wilson v. Lawrence Cty.,* 260 F.3d 946 (8th Cir. 2001), and *Zahrey v. Coffey,* 221 F.3d 342 (2d Cir. 2000). Petitioners sought review of that ruling. This Court granted certiorari. *Pottawattamie Cty., IA v. McGhee*, 129 S. Ct. 2002 (2009).

SUMMARY OF ARGUMENT

This case is not just about drawing a good lawyerly line between precedents. Petitioners' admitted conduct recalls law enforcement abuses from the Jim Crow South. The facts are that Terry Harrington and Curtis McGhee are black and once were young, and that John Schweer was white and had been a police captain. Together, these facts made it easy for petitioners and their accomplices to frame Harrington and McGhee for murder. Protecting that odious conduct under the shield of absolute immunity would add to the temptation of prosecutors investigating crimes that have outraged the community, and deny innocent victims compensation for terrible wrongs.

Fabricating evidence with intent to convict the innocent violates due process at the time of the fabrication. Using at trial evidence known to be false violates due process even when the trial prosecutor was not personally involved in the fabrication. The proposition that combining violations of the Constitution insulates the wrongdoers from liability is illogical and repugnant.

Absolute immunity is not required to ensure energetic law enforcement or to prevent a flood of frivolous lawsuits. Ubiquitous indemnification arrangements make the specter of personal liability spectral indeed. Qualified immunity has not chilled courageous action by police officers, who must make split-second life-and-death decisions without the luxury of time and without the prosecutor's

professional expertise. Frivolous suits are rare, and could be made rarer by Congress should they be seen to increase in response to a ruling holding prosecutors accountable for framing the innocent. In any event, when police and prosecutors engage in the same investigative work, it would be illogical and unfair to hold officers of the court to a lower standard.

We can imagine few rulings of this Court that would send a more negative message about American criminal justice than to permit white prosecutors to frame African-American suspects for the murder of a white police officer, admit the outrage, and then walk away with impunity, after their victims have wrongfully suffered twenty-five years in prison.

ARGUMENT

I. The Court Should Take Into Account Our Country's History Of Racial Discrimination, And Of False Convictions, When Deciding The Scope Of Prosecutorial Immunity

The standard recipe for a miscarriage of justice combines community outrage over an especially hateful offense with an official investigation focused on a black suspect. This Court has seen this combination before. In *Powell v. Alabama,* 287 U.S. 45 (1932)—the infamous case of the "Scottsboro boys"—the Court reversed the convictions of nine black youths accused of raping two white women. The judgment of history is that the accusation was false. *See* Michael J. Klarman, *The Racial Origins of*

Modern Criminal Procedure, 99 Mich. L. Rev. 48, 79 (2000).

In other cases from this period, however, the conduct of the "investigations" and "trials" was so wholly unconcerned with truth that it is difficult to say whether the authorities framed the innocent or chose, by chance, targets who happened to be guilty. In *Moore v. Dempsey,* 261 U.S. 86 (1923), the Court, per Justice Holmes, granted federal habeas petitions brought by black prisoners sentenced to death for murders allegedly committed during the Elaine, Arkansas race riot of October 1919. *See generally* Jeanie M. Whayne, *Low Villains and Wickedness in High Places: Race and Class in the Elaine Riots,* 58 Ark. Hist. Q. 285 (1999); Grif Stockley, Blood in Their Eyes: The Elaine Race Massacres of 1919 (2001). In *Brown v. Mississippi,* 297 U.S. 278 (1936), a unanimous Court, per Chief Justice Hughes, reversed the murder convictions of blacks accused of murdering a white farmer. *See generally* Richard C. Cortner, A "Scottsboro" Case in Mississippi: The Supreme Court and *Brown v. Mississippi* (1986). Confessions obtained by physical torture provided the only evidence against them at trial. *See Brown,* 297 U.S. at 281-84.

These landmark cases had much in common. In each, blacks were accused of heinous crimes against white victims. In *Moore,* the supposed murders took place during an outbreak of mass violence by whites against blacks. White citizens suspected black members of a farmers' union to be planning an insurrection. On September 30, 1919,

A.W. Adkins, a white railroad detective, and Charles Pratt, a white deputy sheriff, confronted members of the union outside a meeting held at a local church. The identity of the man firing the first shot is not known, but shots were fired. Adkins was killed and Pratt was wounded. *See* Whayne, *supra,* at 286-87. The killings provoked massive retaliatory violence. Twenty-five blacks and five whites are thought to have died in the bloodshed. *Id.*

Once the military restored order (after, by some accounts, participating in the race riot), hundreds of blacks were arrested and 79 indicted, twelve for murder. No whites were charged. The trials, conducted in a mob atmosphere, were show trials at which witnesses, coerced by threats including torture, gave implausible testimony that counsel for the defense accepted quiescently. *See Moore,* 261 U.S. at 89-90; Stockley, *supra,* at 106-37; Randall Kennedy, Race, Crime, and the Law 96-97 (1997).

In the Scottsboro case, white and black teens got into a fracas while hopping an open gravel car on a freight train. *See* James E. Goodman, Stories of Scottsboro 3-5 (1994) (summarizing the facts). The white kids lost the fight and were thrown off the train by the black kids. Two white women, Victoria Price and Ruby Bates, remained on the train with the blacks. The white youths reported the incident to a railroad agent who telegraphed to law enforcement officers down the line. These officers arrested the black youths on assault charges at the Paint Rock, Arkansas station. When deputies saw Price and

Bates get off the train, the women accused the blacks of rape.

Again a hostile mob surrounded the courthouse. The trial court appointed counsel only on the day of trial. Trial was again perfunctory, the all-white jury hanging in only one of the cases. On account of one defendant's youth (thirteen), one juror held out for life imprisonment rather than the death penalty. The Supreme Court reversed the convictions. Although the Court centered attention on the denial of counsel, the decision rested on the Due Process Clause, and the overall unfairness of the proceedings figured prominently in the Court's reasoning.

Brown arose from the murder of a white planter named Raymond Stewart. Officers led by Deputy Cliff Dial, acting without probable cause, seized a black man named Arthur Ellington from his home, strung him up from a tree and whipped him. Ellington refused to confess. The next day, the officers rearrested Ellington, and also took into custody Henry Shields and Ed Brown, both also black, for the murder. The prisoners were flogged with a leather strap having a metal buckle. "[A]s the whippings progressed and were repeated, [the prisoners] changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers." 297 U.S. at 282.

Before the indictment, the trial court conducted a preliminary examination of the suspects. The prisoners repeated their confessions in open

court and disclaimed any improper pressures. The trial judge ruled the confessions admissible, although Ellington's neck still showed the mark of the rope. 297 U.S. at 281, 283. Indictment and trial followed immediately, owing to fears of mob action. The trial was again conducted amid tense fears of mob violence; machine guns were thought necessary to secure the courthouse. *See* Cortner, *supra*, at 10. The defendants took the stand and disavowed their confessions as coerced by torture, and the state called the deputies in rebuttal. The deputies freely admitted whipping the defendants. 297 U.S. at 284-85. The jury nonetheless convicted. The state Supreme Court rejected the motion for a new trial, reasoning that the defense had failed to renew the objection to the confessions after the trial evidence showed coercion. *See Brown v. Mississippi*, 158 So. 339, 342 (Miss. 1935). The Supreme Court, per Chief Justice Hughes, unanimously reversed on due process grounds. 297 U.S. at 287.

The state proceedings in *Moore*, *Powell* and *Brown* were trials in form but lynchings in function. *See* Klarman, *supra*, at 57 ("the state-imposed death penalty in these cases was little more than a formalization of the lynching process"). In all these cases, the public prosecutor had the choice to proceed or not. The choice was less easy than hindsight might make it, because honest legal proceedings might have driven the mob to a bloody frenzy. Nonetheless, the prosecutors might have cooperated in some plan to delay and remove the proceedings, or, if necessary to avoid complicity, resign their posts.

Each, instead, chose to proceed in violation of the Constitution.

In the Elaine cases, John Elvis Miller served as prosecuting attorney for the First Judicial Circuit of Arkansas. *See* John Elvis Miller Papers (Miller Papers), *available online at* http://libinfo.uark.edu/SpecialCollections/findingaids/jemilleraid.html (last visited Sept. 10, 2009). After obtaining capital convictions against impoverished blacks, based on coerced evidence, at "trials" dominated by a hostile mob, Miller went on to serve, first as judge, then as United States Senator. *See* Miller Papers, *supra*.

Jackson County Solicitor H.G. Bailey conducted the prosecution of the Scottsboro defendants. *See* Robert F. Martin, *The Scottsboro Cases,* in Historic U.S. Court Cases: An Encyclopedia 637, 638-39 (John W. Johnson ed., 2d ed. 2001). Bailey, so far as we can tell, vanished from the view of history after the Scottsboro cases.

District Attorney John C. Stennis prosecuted Ellington, Brown, and Shields. *See* Cortner, *supra*, at 15. Stennis, like everyone else in the court who saw the rope marks on the neck of Ellington and heard the deputies testify to the flogging, was clearly aware of both the torture and the absence of any other evidence against the defendants. Like Miller, however, having won death sentences based on torture, Stennis left the prosecutor's job to become a judge. *See* Biographical Sketch of John C. Stennis, *available online at* http://library.msstate.edu/cprc/

stennis/bio.asp (last visited Sept. 9, 2009). Like Miller, he was eventually made a Senator. *See* Kennedy, *supra,* at 106 note † ("John Stennis . . . paid no professional or political price for his part in the wrongful prosecutions of the defendants in *Brown*") (citations omitted). The United States Navy gave Stennis the honor of namesake for a *Nimitz* class carrier.

Lynch mobs are a thing of the past in this country, but the Court still sees cases of dubious charges pressed against black defendants charged with crimes that have excited community outrage. In *Olden v. Kentucky,* 488 U.S. 227 (1988), the jury convicted black men of raping a white woman based on remarkably weak evidence. In *Arizona v. Youngblood,* 488 U.S. 51 (1988), a black man convicted of sexually assaulting a ten-year-old boy claimed that the spoliation of potentially conclusive exculpatory evidence called for reversing his conviction. The Court rebuffed the claim. Subsequent, more sophisticated, DNA testing established Youngblood's innocence. *See, e.g.,* Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood: *Due Process, Lost Evidence, and the Limits of Bad Faith,* 86 Wash. U. L. Rev. 241 (2008). In *Chambers v. Mississippi,* 410 U.S. 284 (1973), the Court reversed the conviction of a black defendant charged with murdering a white police officer because the local evidence law prevented the accused from proving three separate confessions made by another black suspect. The events alleged in the complaint here follow the script even more closely

than in *Chambers,* because here, the likely culprit, neglected by the police, was white.

Broader statistics reinforce the persistence of this sad pattern. According to the Innocence Project, among those convicted and later exonerated by DNA evidence, blacks outnumber whites by more than two to one. *See http://www.innocenceproject.org/Content/351.php* (last visited Sept. 2, 2009). In a study of 62 exonerations, Dwyer *et al.* found that 57% of the exonerated were black, and 69% of the victims were white. *See* Jim Dwyer, Peter Neufeld & Barry Scheck, Actual Innocence, app. 2 at 267 (2000). Dwyer *et al.* also found that prosecutorial misconduct was a factor in 26 of the 62 cases in their sample, making it more frequent than "defective or fraudulent science," "bad lawyering," "informants/snitches" and "false confessions." Dwyer *et al.*, *supra*, at 263. In a leading study of DNA exonerations, one reform proposed by Huff *et al.* is to subject the fabrication and concealment of evidence, by prosecutors as well as police, to effective civil remedies. C. Ronald Huff, Arye Rattner & Edward Sagarin, Convicted But Innocent: Wrongful Conviction and Public Policy 152 (1996).

Even today, falsely accused black defendants face major obstacles to vindication at trial. Given the negative correlation between African-American race and wealth, the innocent black defendant is more likely than the innocent white defendant to rely on publicly-provided defense representation. Enormous caseload pressures, often amounting to several

hundred felony cases per year per lawyer, hamper the effectiveness even of the many excellent and dedicated public defenders. *See, e.g.,* Stephen N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads,* 33 Champion 22, 23 n.35 (2009). Some indigent-defense lawyers, moreover, fall well below the standard set by the best. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003).

Even with perfectly fair selection procedures, African-Americans are likely to remain in the minority on juries. Empirical research indicates that white jurors are more ready to convict black defendants than to convict white defendants. *See, e.g.*, Sheri Lynn Johnson, *Black Innocence and the White Jury,* 83 Mich. L. Rev. 1611, 1626 (1985) (summarizing conclusions of nine studies, all of which found that white jurors were "more likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty"); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions,* 92 Mich. L. Rev. 63, 75-86 (1993) (reviewing studies).

We do not suggest qualified immunity for prosecutors during the investigation as a special rule limited to cases of blacks under suspicion for crimes that have outraged the community. We do stress that there *are* such cases, and they provide a very good reason for holding prosecutors generally accountable for deliberate wrongdoing during preliminary investigation. In these cases, the usual

checks on false convictions—a vigorous defense and a skeptical jury—are likely to be less robust than in other cases. It is vital that prosecutors, who can stop the train of events heading toward a miscarriage of justice before the train leaves the station, resist the inevitable pressure to declare a notorious case cleared by the arrest of the perpetrators.

The truly malicious prosecutor motivated to clear a notorious case has a rational incentive to frame the most vulnerable victim, the suspect with the least chance of vindicating his innocence and exposing the fraud. Petitioners deliberately framed victims who were black, young, and poor. Other defendants, such as those in the Duke lacrosse case, might have had the means to mount a gold-plated defense, and been able to count on a jury more open to the possibility of innocence. *Ex post* liability is necessary to deter prosecutorial misconduct that frames victims too vulnerable to have much chance of fighting back at trial.

This case is a throwback to the era of *Moore, Powell,* and *Brown.* There was no mob and there was no torture. Nonetheless, petitioners framed black youths they knew to be innocent for the murder of a white man who had served as a police captain until shortly before the crime.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice." *Rose v. Mitchell,* 443 U.S. 545, 555 (1979). Disparate enforcement of criminal sanctions "destroys the appearance of justice

and thereby casts doubt on the integrity of the judicial process." *McCleskey v. Kemp*, 481 U.S. 279, 346 (1987) (quoting *Rose*, 443 U.S. at 555-56). "Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'" *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). It would be hard to conceive of a more corrosive message about American criminal justice than would be sent by permitting white prosecutors to walk away from colorable allegations that they convicted innocent black youths, not by good-faith error, but by a deliberate and knowing design to pass off counterfeit justice.

II. Qualified, Rather Than Absolute, Immunity Provides Adequate Protection For Prosecutors During Pretrial Investigations

A. Qualified Immunity For Prosecutors During Pretrial Investigation Squares With The Understanding Of Congress In 1871

Congress adopted Section 1983 as a response to racist terrorism in the Reconstruction South. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 276 (1985) ("The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights."); Eric Foner, Reconstruction: America's

Unfinished Revolution 1863-1877, at 454-59 (1988). The authorization of civil suits was secondary and supplemental to the criminal provisions. *See id.* at 457 ("Although, under the Enforcement Acts, aggrieved individuals could file suits against their assailants, the major burden of suppressing violence now fell to the federal government."). Section 1983 supposed that the Klan would be suppressed, and that the southern states might then seek to do indirectly what the Klan had done directly, by means of rigged investigations and show trials "under color of state law."

Congress undertook this positive enforcement effort against a backdrop of common-law tort immunities. These included absolute immunity for judges, grand jurors, trial jurors, and witnesses before either the grand jury or the trial jury. Private prosecution of crime, however, remained common and may well have still been the norm in 1871. *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth Century United States,* 39 Am. J. Leg. Hist. 43 (1995). Private prosecution was particularly well-entrenched in the South, the focus of Congress in enacting civil rights legislation. As late as 1960, the Supreme Court of Mississippi took "judicial notice of the fact that it has been the custom in this State from time immemorial for individuals interested in the punishment of an accused, such as the husband of the deceased, to employ a special prosecutor in whom they have particular confidence to assist the State's attorney in the prosecution. This practice has been uniformly permissible in this

State." *Goldsby v. State,* 123 So. 2d 429, 437 (Miss. 1960).

The government's brief rightly recognizes malicious prosecution for procuring false accusations at the time Section 1983 was adopted. Brief for the United States at 28-29. The government then connects the historical liability of accusers with the ahistorical absolute immunity rule adopted in *Imbler*. *See Kalina v. Fletcher,* 522 U.S. 118, 132 (1997) (Scalia, J., concurring) ("There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted. (Indeed, as the Court points out. . . there generally was no such thing as the modern public prosecutor.)"). *Imbler*'s turn to absolute immunity reflects policy considerations that supported absolute immunity for judges in 1871. Those policy considerations today are thought to support absolute immunity for prosecutors in their quasi-judicial role, s*ee Kalina,* 522 U.S. at 125 n.11, but only qualified immunity during preliminary investigations, *see Buckley,* 509 U.S. at 269-70; *Kalina,* 522 U.S. at 126 (reaffirming *Buckley*'s functional approach).

Prosecutorial immunity under Section 1983, then, derives from the performance of prosecutorial functions rather than from public office. *See Buckley,* 509 U.S. at 273 ("the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor"). We know of no evidence suggesting a legislative purpose to distinguish between public and private prosecutors. Private prosecutors clearly had no absolute immunity from

malicious prosecution actions; that would have nullified the action altogether. The elements of the action, however, imply qualified immunity for pretrial prosecutorial functions. *See Kalina,* 522 U.S. at 132 (Scalia, J., concurring); *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity,* 2005 B.Y.U. L. Rev. 53, 111 (2005).

B. Liability Of Prosecutors Under Section 1983 For Constitutional Violations During Investigation May Not Be Nullified By Subsequent Constitutional Violations During The Process Of Formal Adjudication

These petitioners and the officers with whom they conspired planned in advance to pervert their offices. We do not see that as an inspiring ground of defense. But *see Buckley v. Fitzsimmons,* 20 F.3d 789 (7th Cir. 1994). Respondents have, we believe, two quite sound theories of petitioners' liability for acts that were covered only by qualified immunity under *Buckley.*

First, this Court has held that outrageous misconduct by public officials during investigations may violate the Due Process Clause, whether or not trial follows. When petitioners, prior to the True Information, fabricated and withheld evidence, they knowingly violated the Due Process Clause. They are liable for all damages proximately caused by the violation.

This Court has recognized that trial and conviction are not essential to completed violations of

the Constitution. In *Chavez v. Martinez,* 538 U.S. 760 (2003), a majority of the Court refused to endorse the theory that Fifth Amendment violations depend on use of compelled statements at trial. Justice Kennedy, joined by Justice Stevens and Justice Ginsburg, stated that this theory "strips" the Self-Incrimination Clause "of an essential part of its force and meaning." 538 U.S. at 793 (Kennedy, J., concurring and dissenting). Justice Souter and Justice Breyer concluded, for prudential reasons, that liability for damages was inappropriate when the violation involved no more than questioning a suspect without a *Miranda* warning. *See* 538 U.S. at 778 (Souter, J., concurring). Justice Souter's concurrence recognized a wide range of Fifth Amendment law beyond the "core" prohibition of compelled testimony at trial. *Id.*

Due process prohibits "conduct that shocks the conscience" during criminal investigations. *Rochin v. California,* 342 U.S. 165, 172 (1952). In *Chavez, supra,* five justices—Justice Stevens, Justice Kennedy, Justice Ginsburg, Justice Souter, and Justice Breyer—concluded that the due process claim should go forward on remand. Justice Souter's opinion, joined by Justice Breyer, did not endorse the due process claim as patently meritorious, only colorable. Justice Souter, however, did quote approvingly this language from *Sacramento v. Lewis,* 523 U.S. 833, 849 (1998): "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Chavez,* 538 U.S. at 775 (Souter, J., concurring).

That officers of the court would suborn perjury and conceal evidence as part of a calculated plan to convict the innocent should offend "even hardened sensibilities." *Rochin,* 342 U.S. at 210. *Rochin* involved the violence of a midnight entry without warrant and the infamous stomach-pumping. This case is worse. Here, justice was murdered, by her sworn protectors, with premeditation and deliberation. The violence attending the planned, and resulting, decades of imprisonment makes the stomach-pumping seem a trifle. Respondents therefore allege violations of due process completed at a time when petitioners had only qualified immunity.

Respondents' second theory is equally sound. Even if an unfair trial is essential to a violation, in this case respondents were in fact convicted after a fundamentally unfair trial. We see nothing illogical in holding wrongdoers acting without immunity liable for injuries suffered at the end of a causal sequence that includes acts that are protected by absolute immunity. *See Dennis v. Sparks,* 449 U.S. 29 (1980). If pretrial acts, undertaken with only qualified immunity, lead directly to other acts by the same parties, protected by absolute immunity, that amount to gross violations of constitutional rights at trial, the wrongdoers remain accountable for the consequences of their earlier misconduct. *See Zahrey v. Coffey,* 221 F 3d 342, 353-54 (2d Cir. 2000). The relevant question is not immunity, but proximate cause.

C. A Return To Scottsboro And Kemper County

We can test petitioners' theory of absolute immunity against respondents' theories of liability by considering hypothetical cases of prosecutorial involvement in the outrageous conduct in *Powell,* and then again in *Brown.*

The first hypothetical case—we will denominate the hypothetical case in quotes rather than italics to make clear that it is indeed a hypo—is "Powell v. Bailey." In the actual Scottsboro case, the women alleged rape to a deputy at the railroad station, whether *sua sponte* or in response to a question is unclear. Suppose we modify the facts of the Scottsboro case by imagining that when Ruby Bates and Victoria Price got off the train in Paint Rock, the county solicitor, H.G. Bailey, has accompanied the deputies. Before Price or Bates has a chance to say anything, Bailey says: "What on earth are two white women doing on a train with nine young black men? They must have raped you, didn't they?" Suppose further that Bates and Price *deny* having any contact, sexual or otherwise, with the arrested blacks. Bailey then says that if Bates and Price don't change their story to accuse the blacks of rape, Bailey will prosecute them for vagrancy. Bates and Price reluctantly agree and tell Bailey that the seven blacks on the car attacked them. Bailey knows that there were nine blacks on the train, and corrects the account. Bailey also knows that a knife was found on one of the arrested men, and instructs Bates and Price to include that in their story.

Our hypothetical concludes when Bailey conducts the direct examination of Price and Bates at the trials. As in the real Scottsboro case, Ozzie Powell is convicted, and despite reversal of the instant conviction the state persists in retrying him with the result that he spends decades in prison. Suppose now that Powell is exonerated, released, and brings an action against Bailey under Section 1983.

As we understand the theory propounded by petitioners and the government, Bailey wins without a trial in our hypothetical case. "All" he has done is invent a false charge and coerce and coach vulnerable witnesses into reading his script into evidence at trial. Either Bailey's immunity for the direct examination at trial relates back to suborning the perjury at the railroad station in Paint Rock, or there is no constitutional violation until trial where absolute immunity protects him.

Our second hypothetical case is "Brown v. Stennis." In our hypothetical case, the district attorney is present during the flogging, advising Deputy Dial and demanding that the prisoners adjust their stories, with a view to the elements of the charge and the rules of evidence. At Brown's trial, as in the real case, the prosecutor offers the confessions into evidence. In our hypothetical, Brown is convicted, and exonerated only after spending decades in prison.

As with the hypothetical case based on the Scottsboro cases, in this hypothetical Brown now sues Stennis under Section 1983. Petitioners and the

government might admit that the hypothetical Stennis has only qualified immunity (and so is liable) for the Fourth Amendment illegal detention and excessive force claims. But the hypothetical Stennis wins, on their theory, on summary judgment on the due process claim. There was no violation until the unfair trial, and at trial the prosecutor has absolute immunity.

Any theory that would insulate pretrial prosecutorial participation in a rerun of *Powell* or *Brown* must be wrong. The notion that a government lawyer could avoid liability under Section 1983 just by shedding the Klansman's sheet, putting on a suit and tie, and moving the lynching into the courthouse flies in the face of the text and history of the statute. The Klan's acts of terror by night were not done "under color of state law." Congress of course adopted criminal provisions to deal with that out-and-out terrorism. Preventing the state from engaging in the same racist violence as the Klan, under color of law, is the very *raison d'etre* of Section 1983.

We think *Buckley* coupled with respondents' due process and proximate cause theories of liability do a much better job with our hypothetical cases. In the hypothetical based on the Scottsboro cases, the prosecutor lacks probable cause for rape although the prisoners are under arrest for assault. Under *Buckley* he therefore has only qualified immunity. He knows that suborning perjury is a crime and that the targets of his abuse are entirely innocent. At the Paint Rock station, then, he violates Powell's due

process right against outrageous investigative misconduct, and he has no qualified immunity defense given his knowledge and motives. At the subsequent trial, we agree that the hypothetical prosecutor has absolute immunity. His acts there, however, are the direct result of his earlier outrageous conduct. The idea that liability is extinguished rather than aggravated by following through on the evil design is absurd and repugnant.

On the hypothetical based on *Brown,* the deputies have only qualified immunity and so are liable for blatantly unconstitutional conduct. Petitioners and the government would discriminate in favor of the prosecutor. We, however, see the hypothetical prosecutor as acting just as the deputies, and so due only qualified immunity under *Buckley.* The notion that the prosecutor's role in presenting the coerced confessions at trial shields their extraction by torture beforehand is repellant.

The complaint in the instant case does not allege a mob of thousands kept out of the trial by troops with machine guns on the roof of the courthouse. We do not think that difference helps petitioners. The officials responsible for the prosecutions in *Powell* and *Brown* were threatened by the outbreak of lynch law; petitioners acted under no such duress. The conspiracy alleged in the complaint constituted a miniature lynch mob, acting methodically by stealth rather than spasmodically by force, under the forms of law. Section 1983 exists to prevent this sort of legalized lynching.

There is a point of distinction from *Brown,* in that the petitioners managed to suborn the witness Hughes without resorting to torture. If petitioners' alleged misconduct is more sanitary than the facts of *Brown,* however, it is a good deal worse than the facts of *Powell.* Price and Bates apparently accused the Scottsboro defendants without prosecutorial prompting.

The obvious difficulty posed by *Imbler* and *Buckley* is where to draw the line between prosecutorial and investigative functions performed before trial by persons holding prosecutorial office. *Buckley* declined to make probable cause a litmus test: "Even after that [probable cause] determination . . . a prosecutor may engage in 'police investigative work' that is entitled only to qualified immunity." 509 U.S. at 274 n.5. For example, although the practice has become uncommon, prosecutors have participated in custodial interrogation. *See, e.g., Stroble v. California,* 343 U.S. 181, 186 (1952). If a police officer and a prosecutor, both seeking a confession for use at trial, take turns beating the prisoner with a rubber hose, it makes no sense to say that the police officer is liable and the prosecutor is not.

The line may need to be drawn case-by-case, but we can suggest a determinate place is to presume absolute immunity after and not before. Under *Kirby v. Illinois,* 406 U.S. 682 (1972) (plurality opinion) and subsequent cases, the Sixth Amendment right to counsel attaches only with the commencement of formal proceedings, by way of indictment,

information, arraignment or preliminary hearing. Justice Stewart stated:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

Id. at 689-90. This is an easy line to draw, because it must be drawn, and has been drawn already in decades of caselaw, for Sixth Amendment purposes. It is also a functional line, for as the Sixth Amendment cases hold, the formal adjudicatory process, in which the distinctive skill-set of the lawyer is required, has not begun. If the suspect has no need for professional legal advice at this stage, we see no general reason for the absolute prosecutorial immunity appropriate to the formal process. The right to counsel, moreover, is offense-specific, *Texas v. Cobb,* 532 U.S. 162 (2001), and so neatly resolves the issue that might arise on a probable-cause reading of *Buckley* when a prosecutor is alleged to have fabricated evidence of Charge X against a suspect arrested, with probable cause, for wholly unrelated Charge Y.

D. Qualified, Rather Than Absolute, Immunity For Prosecutors During Pretrial Investigations Would Not Inhibit The Vigorous Pursuit Of Legitimate Law Enforcement

The Justice Department's picture of government lawyers quaking in their wingtips lest the pursuit of criminals subject them to damages is demonstrably false. In the first place, the apparently universal practice is for employing entities to undertake to defend and indemnify law enforcement officials, whether by custom, contract, or, as in this case, statute. *See* Ia. Code, Title XV, § 670.80. *See generally* John C. Jeffries, Jr., *Disaggregating Constitutional Torts,* 110 Yale L. J. 259, 267 (2000). If there are outlying jurisdictions that leave their prosecutors to go it alone, those jurisdictions can, by contract, custom or statute, now undertake to defend and indemnify.

Whatever disincentives to legitimate law enforcement liability may create, then, operate indirectly, on public officials in charge of the employing entity that would be obliged to pay up when prosecutors are called to account. These same employers, of course, face political incentives to take vigorous action against crime. Those pressures can foster miscarriages of justice. *See* Section I, *supra.* Given those powerful political incentives, we think some mild pressure in the direction of sober second thoughts makes sense, whether the officials engaged in pretrial investigation wear police blue or the legal profession's business attire.

Currently the police have only qualified immunity under such cases as *Malley v. Briggs*, 475 U.S. 335 (1986). If qualified immunity provides insufficient protection for vigorous law enforcement, we would expect evidence that the police are acting with less energy than is desirable. This suggestion would doubtless be received with some offense by the families of officers who have lost their lives in the line of duty (32 to gunfire this year so far, *see* The Officer Down Memorial Page, *available online at* http://www.odmp.org/year.php (last visited Sept. 5, 2009)), and by the tens of thousands of police forcibly resisted in the line of duty every year. *See* Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2005* (2006), *available online at* www.fbi.gov/ucr/killed/2005/pressrelease.htm (last visited Sept. 5, 2009) (57,546 officers assaulted in previous year; guns involved in 3.7% of these cases).

It might also be received with skepticism by the tens of thousands of citizens who file complaints against the police for excessive force. *See* U.S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics, table 1.0004.2002, *available online at* www.albany.edu/sourcebook/pdf/t100042002.pdf (last visited Sept. 5, 2009) (in 2002, 26,556 citizens filed complaints of excessive force against officers employed by large departments). The hundreds of thousands of New Yorkers detained under *Terry* without grounds for a subsequent arrest or citation might likewise be surprised to learn that the specter of tort damages has sapped the will of officers on patrol. *See* Greg Ridgeway, Analysis of Racial Disparities in the New York Police Department's

Stop, Question, and Frisk Practices xi, xv (2008) (in sample of more than 500,000 recorded *Terry* stops, 90% resulted in neither arrest nor citation). The social scientists who conducted a careful observation study of 115 police-citizen encounters, which drew all doubtful inferences in favor of the police, and found 30% of the incidents to violate the Fourth Amendment, would likewise be quizzical. *See* Jon Gould & Stephen Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 Criminology & Pub. Pol'y 315 (2004).

This is not to say that civil liability has no effect on official behavior. The employing entity trains and disciplines its employees and accounts for liability risks in the process. When police action is flagrantly illegal and inflicts injuries meriting substantial damages, as with unnecessary police shootings, the government employers frequently agree to pay significant settlements. *See* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims,* 52 Buff. L. Rev. 757 (2004). Police training and discipline translate this liability risk into more careful behavior. A study of the effects of *Tennessee v. Garner,* 471 U.S. 1 (1985), for example, found that the decision induced a sixteen percent reduction in police homicides nationwide, and that this effect was substantially more pronounced in jurisdictions that had permitted deadly force to apprehend any fleeing felon prior to *Garner*. *See* Abraham N. Tennenbaum, *The Influence of the* Garner *Decision on Police Use of Deadly Force,* 85 J. Crim. Law & Criminology 241, 256 (1994).

The need for some disincentive to gross prosecutorial misconduct is conceded by the formal applicability of professional and criminal sanctions, despite the withdrawal of the tort remedy. We think these sanctions are draconian in theory and illusory in practice:

> Since 1963, at least 381 murder convictions across the nation have been reversed because of police or prosecutorial misconduct. A study by Ken Armstrong, the legal affairs writer for the Chicago Tribune, found that not one of the prosecutors who broke the law in these most serious charges was ever convicted or disbarred. Most of the time, they were not even disciplined.

Jim Dwyer, Peter Neufeld, & Barry Scheck, Actual Innocence 175 (2000), citing Chicago Tribune, January 8, 1999-January 12, 1999, "Trial and Error" series by Ken Armstrong and Maurice Possley.

Criminal prosecutions and bar proceedings have an additional failing. They do nothing to compensate the victims of prosecutorial abuse for their injuries. *See Carey v. Piphus,* 435 U.S. 247, 254 (1978) ("Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument."). Even if indemnification completely nullified any deterrent incentives under a regime of qualified immunity, such a regime would at

least relieve wholly innocent victims from some of the losses inflicted by malicious misconduct.

E. A Qualified Immunity Standard For Prosecutors During Pretrial Investigations Would Not Invite A Flood Of Frivolous Suits

We do not believe that prosecutors will become inundated by frivolous claims. In the first place, we note that litigation takes time and money. A few crackpots may have a taste for suing public officials, but the typical *pro se* complaint can be dismissed on the pleadings. Indeed, the heightened pleading requirements demanded by *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and applicable in constitutional tort cases, *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), have apparently fostered a surge of Rule 12(b)(6) motions in civil rights cases. *See* Ettie Ward, *The After-Shocks of* Twombly: *Will We "Notice" Pleading Changes?,* 82 St. John's L. Rev. 893, 915 (2008).

If petitioners are correct that ethical and criminal sanctions adequately restrain prosecutorial misconduct, plaintiffs' lawyers, to whom those same rules apply, provide an important filter against frivolous suits. Pressing a false claim against a prosecutor could not be done without perjury, by the client if not by counsel, and the prospect of a perjury prosecution for lying in a case against a prosecuting attorney seem vastly greater than in ordinary cases.

Coupled with *Iqbal,* Federal Rule of Civil Procedure 11 adds an additional safeguard against

frivolous claims. Rule 11 was strengthened by amendments in 1983—seven years after *Imbler*. The 1983 amendments were widely thought to chill colorable but novel civil rights actions, as well as frivolous suits. *See* Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments,* 37 Val. U. L. Rev. 1, 11 (2002). Further amendment to the Rule, in 1993, made the imposition of sanctions less likely, but the Rule still serves as a substantial deterrent. *See generally id.* This history suggests that whatever risk of frivolous lawsuits a qualified immunity standard might run, the Advisory Committee and Congress have the capacity to respond to frivolous litigation with effective deterrents more discriminating than the blunt instrument of absolute liability. *Cf.* The Prisoner Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

Qualified immunity has not induced a torrent of false claims against the police. Yet frivolous suits against police officers are much more likely than frivolous suits against prosecutors. There were more than fourteen million arrests in 2007. *See* Sourcebook of Criminal Justice Statistics, *supra*, table 4.1.2007. Each of these arrests is subject to suit under the qualified immunity rule of *Malley v. Briggs*. There are many more *Terry* stops, also subject only to qualified immunity.

By contrast, in 2004 there were just over a million felony convictions, all together, in the state courts. *Id.,* table 5.44.2004. Ninety-five percent of these were entered on pleas, rather than after trials. *Id.,* table 5.46.2004. Under *Buckley*'s functional test, much prosecutorial conduct is still covered by the absolute immunity standard. The volume of cases in which prosecutors play a significant enough role in pretrial investigation to be subject to even frivolous allegations under a qualified immunity standard is much smaller than the number of cases in which the police are vulnerable to suit.

III. Prosecutors Should Not Be Held To A Lower Standard Than Uniformed Officers

As we have seen, dozens of officers are slain, and tens of thousands assaulted, every year. They make millions of arrests and millions more *Terry* stops. They must make life-and-death decisions, on the spot, in less time than it takes to read this paragraph. Yet police officers enjoy only qualified immunity, a standard that, we explain above, has influenced police behavior without undermining police effectiveness.

Prosecutors hold both undergraduate and law degrees. They have passed the bar exam and are officers of the courts. Most have some experience and at least some professional training and supervision. It seems fair to suppose, given their professional knowledge, that in the great majority of cases of prosecutorial misconduct, the offending prosecutor

subjectively knows the conduct is illegal. The same may not always be true of police officers. Most are high-school graduates but only a quarter have college degrees. *See* Hazel Glen Beh, *Municipal Liability for Failure to Investigate Complaints Against Police,* 25 Ford. Urb. L. J. 209, 214 n.19 (1998). Despite advances in police training about the relevant constitutional law, it seems highly improbable that police knowledge of legal requirements equals that of prosecutors.

These differences very strongly imply holding prosecutors to at least the same standard as police. From the standpoint of behavioral incentives, prosecutors are more likely to know with confidence whether a prospective action is legal or illegal. They will know the indemnity arrangement they have with their employer. They will also know that even the qualified immunity standard protects them against reasonable mistakes. When they have doubts, about either the law or the facts, they have the luxury of at least some time to enquire before decision, a luxury police officers do not enjoy.

A qualified immunity standard therefore strikes a better balance between over-deterring and under-deterring prosecutorial misconduct during preliminary investigation than is struck by the same standard with respect to the police. Given the pressure of events and the limited training even good departments can provide, accidental but clear police departures from legal standards are regrettable but inevitable. Given the time for decision and the sophistication of the decision-makers, a clear

departure from legal standards by prosecutors is very likely to be malicious. Prosecutorial sophistication suggests that malicious violations can be targeted without discouraging aggressive but legal law enforcement.

From the standpoint of fairness, we are troubled by the prospect that after the law enforcement team is shown to have crossed the line into illegality, the white-collar prosecutors with better reason to know the line will be seen to walk away, while the blue-collar police with less reason to know the line will be held to answer. As things stand, the liability of a police officer who resorts to violence in a dangerous emergency depends on how a jury evaluates the reasonableness of the officer's response long after the fact. Yet a prosecutor who carefully plans a course of perjury and obstruction answers to no one, except other prosecutors. We think an observation Churchill attributed to Lord Balfour is apposite here: "This is a singularly ill-contrived world, but it is not so ill-contrived as that." Churchill by Himself: The Definitive Collection of Quotations 174 (Richard Langworth ed., 2008).

CONCLUSION

The briefs for petitioners and for the United States both ignore the central features of this case. From reading them, you would not know that Curtis McGhee and Terry Harrington are black, or that petitioners and those they are alleged to have conspired with were white law enforcement officials investigating the murder of a white man who had

until recently been a police captain. If you term search both briefs for "African-American," "black," and "white," all you will find are references to Justices or cases named "Black" or "White."

Any recognition of how the facts of this case recall egregious abuses from some of legal history's worst pages would have detracted from arid logic-chopping aimed at extending the extraordinary shield of absolute immunity. Yet facts, as John Adams once told a Boston jury, are stubborn things. We think the court below was right to hold prosecutors, like police, accountable, albeit subject to a defense of qualified immunity, for the consequences of the alleged gross misconduct. Those consequences include the respondents' quarter century in prison for a crime that no evidence untainted by plausible allegations of official misconduct suggests they committed. Accordingly, we ask this Court to affirm the judgment of the Court of Appeals.

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In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

CURTIS W. MCGHEE JR.
AND TERRY J. HARRINGTON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Center on the Administration of Criminal Law ("the Center"), based at New York University School of Law, is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is a central feature of criminal enforcement at all levels of government, there is a dearth of scholarly attention to how prosecutors actually exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decisionmaking. The Center's litigation program, which consists of filing briefs in support of both the government and defendants, aims to bring its empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts. The Center focuses on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues. The Executive Director of the Center was a federal prosecutor for 12 years and worked in the United States Attorney's Office for the Southern District of New York, the United States Attorney's Office for the District of

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[1] The parties have consented to the filing of this amicus brief and their consent letters have been filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Columbia, and the United States Department of Justice in Washington, D.C.

The Center files this *amicus* brief in support of Respondents' brief to highlight its concern about the potential harms of expanding absolute immunity to cloak pre-indictment, investigative conduct by prosecutors. The Center has an interest in advancing qualified, not absolute, immunity as the better and more workable standard to apply to such conduct, including the conduct alleged in the instant case. To adopt the rule Petitioners propose would subject prosecutors to a higher level of protection than that provided to police officers and other law enforcement officials performing essentially identical functions, create perverse incentives for unethical prosecutors to exercise their discretion to charge suspects as a means of immunizing misconduct they committed at the pre-indictment stage, and skew prosecutors' incentives in choosing between horizontal prosecution models that segregate investigative and adjudicative functions and vertical prosecution models that do not.

SUMMARY OF ARGUMENT

Absolute immunity for public officials acting in their official capacities is the exception, not the rule. This Court has consistently held that absolute immunity is a shield to be used sparingly. For prosecutors, this shield protects only the exercise of prosecutorial discretion to pursue charges against a suspect and subsequent advocacy to prove those charges beyond a reasonable doubt. Absolute immunity is not available to prosecutors, just as it is

not available to police officers and other law enforcement officials, for conduct that is investigative in nature and that occurs prior to the charging of a suspect. Instead, prosecutors are entitled to qualified immunity for such conduct. This is the clear holding of *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Petitioners would have this Court undermine *Buckley*'s core holding by extending the reach of absolute immunity to cloak retroactively a prosecutor's investigative conduct where the conduct produced evidence the prosecutor subsequently chose to introduce to a grand jury or at trial. Such an expansion of the limited doctrine of absolute immunity is unwarranted under this Court's precedent and unjustifiable as a matter of policy and common sense.

This Court has been clear that prosecutors functioning as investigators prior to the bringing of charges receive qualified immunity, the same protection that traditional investigators such as police officers receive in such circumstances. Petitioners attempt to resurrect a proposition firmly rejected in *Buckley* – namely, that prosecutors functioning as investigators nevertheless may enjoy absolute immunity if their pre-indictment investigative conduct results in evidence that is later used in the grand jury or at trial. Such a rule cannot be reconciled with the language or reasoning of *Buckley* – which puts the character of the conduct at the heart of the analysis, not the identity of the investigator – and would afford prosecutors more protection than police officers and other law enforcement officials for exactly the same conduct.

Nor are Petitioners and their *amici* correct in their assertion that absolute immunity is necessary to ensure that prosecutors are not deterred from doing their jobs. Qualified immunity is a better and more workable standard that provides substantial and sufficiently appropriate protections for prosecutors from liability for their actions during the investigative stage. Indeed, several states have long provided only qualified immunity to prosecutors and other government officials performing discretionary acts in good faith and within the scope of their authority with no apparent impairment of their ability to exercise their duties. Qualified immunity will not deter prosecutors acting in good faith to gather facts and assess evidence prior to deciding whether there is sufficient probable cause to bring charges against a suspect. As this Court noted in *Buckley*, the prosecutor's appropriate pre-indictment role is far more akin to a neutral fact-finder than it is to an advocate, and there is scant justification for expanding absolute immunity to prosecutors whose conduct at that stage grossly deviates from the standards we expect of them. Qualified immunity would deter only the most egregious and willful acts of prosecutorial misconduct that constitute clear violations of law, professional standards, and moral principles during the investigative stage, the very point that prosecutors are expected to be at their most objective and truth-seeking. Qualified immunity accords with *Buckley* and balances, more effectively than alternatives such as professional disciplinary proceedings, the public interest in fair investigations and trials with its complementary interest in zealous prosecution of criminal conduct.

To expand the reach of absolute immunity would have a detrimental effect on prosecutorial incentives in making charging decisions. Under the rule proposed by Petitioners, a prosecutor who decides to bring charges against a suspect will retroactively receive absolute immunity for even purely investigative conduct at the pre-indictment stage so long as it is in some way connected to evidence later used at trial. Accordingly, regardless of the strength of the evidence, an unethical prosecutor has a strong incentive to bring charges against a suspect, and perhaps falsify even more evidence to increase the chances of securing a conviction, to shield herself from civil liability for her misconduct at the investigative stage. Absolute immunity would strengthen the hand of unethical prosecutors, do nothing to encourage ethical ones, and would remove a key tool in uncovering prosecutorial misconduct through civil discovery and lawsuits. A criminal justice system with such incentives would corrupt the proper exercise of prosecutorial discretion.

Finally, extending absolute immunity as suggested by Petitioners would push prosecutor's offices to employ a vertical prosecution model in which the same prosecutor investigates and makes decisions about charging and advocacy at trial. Application of absolute immunity would cause prosecutors to discount any potential benefits of a horizontal prosecution model – one where the investigative and adjudicative functions are segregated between two different sets of prosecutors. Prosecutors should be left to choose the structural design of their offices to best accomplish their

primary mission of law enforcement without the skewing effect of the applicable immunity standard.

ARGUMENT

I. Prosecutors Should Have Qualified, Not Absolute, Immunity for All Investigative Stage Conduct, Including the Procurement of False Testimony from a Witness

Absolute immunity exists to enable prosecutors to exercise independent judgment on charging decisions and to advocate vigorously to prove their cases in the courtroom. Although this Court has ruled that prosecutors are entitled to absolute immunity while engaged in conduct that is "intimately associated with the judicial phase" of a criminal proceeding, *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), absolute immunity is the exception, not the rule, and its scope should be "quite sparing." *Burns v. Reed*, 500 U.S. 478, 487 (1991) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)). The primary purpose of absolute immunity is not to advance "the interest in protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties," but rather to advance "the interest in enabling him to exercise independent judgment when 'deciding which suits to bring and in conducting them in court.'" *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997) (quoting *Imbler*, 424 U.S. at 424).

This Court has cautioned that absolute immunity is justified only when there is great risk

that prosecutors will be deterred from the effective performance of their appropriate role as advocates. There is no such risk for prosecutors acting as investigators, not advocates, at the pre-indictment stage, nor would the application of a lesser degree of immunity prior to the filing of formal charges significantly impair the judicial process as Petitioners and their supporting *amici* suggest. The case law in this area reflects a careful balancing of the need to preserve a sphere of uninhibited discretion for prosecutors when acting as advocates against the need to provide fair and meaningful redress for the victims of egregious constitutional violations. *See Buckley*, 509 U.S. at 269.

To preserve this balance, prosecutors gathering evidence in connection with a criminal investigation prior to the commencement of formal charges should be afforded qualified, not absolute, immunity, regardless of whether that evidence is later used in some way in the grand jury or at trial. Extending the impenetrable shield of absolute immunity to prosecutors performing an investigative function would protect, and possibly encourage, flagrant and unchecked abuses of investigative techniques, many of which could amount to violations of a suspect's constitutional rights, without providing ethical prosecutors any substantial additional protections beyond the quite robust ones already provided by the qualified immunity standard.

Petitioners assert that qualified immunity is inadequate because it will open the floodgates to vexatious litigation, with the effect of deterring

prosecutors from conducting effective investigations. *But see Burns*, 500 U.S. at 494 (there is little danger of "harassment and intimidation" stemming from "vexatious litigation" over legal advice given by prosecutors to investigating officers). As this Court has noted, however, qualified immunity offers quite substantial protections to public officials acting in their official capacities, and the hurdles for filing a suit aimed at defeating an official's qualified immunity defense are high, and the hurdles for succeeding even higher. A plaintiff seeking to overcome a defense of qualified immunity must show that a government official acted so as to violate a clearly established statutory or constitutional right that a reasonable person in the official's position would have known to exist. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity thus "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns*, 500 U.S. at 494-95 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (internal quotation marks omitted)). This is especially true in light of the strict pleading requirements of *Ashcroft v. Iqbal*, which further reinforce the protections of qualified immunity and require courts to focus on the substantive plausibility of allegations of misconduct at the pleadings stage, rather than the mere possibility that the allegations might be true. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009). Not only is overcoming a defense of qualified immunity daunting, but § 1983 plaintiffs must also independently demonstrate all of the elements of a constitutional violation and legal causation of injury. *See City of Canton Ohio v. Harris*, 489 U.S. 378, 389-

91 (1989); *West v. Atkins*, 487 U.S. 42, 48-50 (1988); *Martinez v. State of Cal.*, 444 U.S. 277 (1980).

The overwhelming majority of prosecutors are ethical public servants motivated by a desire to do justice. Their activities will be guided by the law, the facts, and their own moral compass, which will protect their conduct regardless of what immunity standard is applied at different stages in a criminal investigation and prosecution. The immunity standard can affect the behavior of unethical prosecutors, however, by exposing them to civil liability for serious misconduct committed at the investigative stage. Application of the qualified immunity standard to a prosecutor's investigative conduct during the pre-charging, fact-gathering phase of an investigation – the same protection afforded police officers and other law enforcement officials performing identical investigative tasks – will protect ethical prosecutors and deter only the most egregious misconduct. Qualified immunity at the pre-indictment stage will enhance, not undermine, the ethical prosecutor's ability to be a zealous advocate once formal charges have been initiated and deter only that conduct which would fundamentally compromise a suspect's right to a fair trial.

A. Police Officers are Entitled to Qualified, Not Absolute, Immunity and the Same Standard Should Apply to Prosecutors Performing an Investigative Function

Qualified immunity has long been a workable standard at the investigative stage for police officers

and other law enforcement officials and does not pose a significant burden on the effective performance of their duties. There is no reason to expect that qualified immunity would present any more of a hindrance to prosecutors acting in an investigative capacity. Indeed, it is settled law that prosecutors performing an investigative function before the filing of charges are entitled only to qualified immunity. *See Buckley*, 509 U.S. at 259; *Kalina*, 522 U.S. at 118. Using the "functional approach" refined in *Burns*, the Court explained that it is the nature of the function performed, not the identity of the person performing it, that should be considered in determining whether absolute or qualified immunity should apply. *Buckley*, 509 U.S. at 269. If the prosecutor's activities are not advocatory in nature – i.e., not "*intimately* associated with the judicial phase of the criminal process," *Imbler* at 430 (emphasis added) – then absolute immunity does not shield the prosecutor from potential civil liability for misconduct.

Procuring false testimony through the coercion of witnesses during the pre-indictment fact-gathering stage of a criminal investigation is not in any sense advocatory and should not be shielded by absolute immunity. *See Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1996) (prosecutor was not entitled to absolute immunity for alleged misconduct of intimidating and coercing witnesses, functions related to typical police functions). Rather, such conduct is an abuse of investigative techniques directed at ensuring that the government has acquired incriminating evidence, without regard for its truthfulness. The procurement of evidence prior

to the filing of formal charges is a classic police function, i.e., the collection of information to be used by a prosecutor in determining whether to commence a criminal prosecution. *See Barbera v. Smith*, 836 F.2d 96, 100 (2d Cir. 1987) (holding that acquiring evidence that may be used in a prosecution, as opposed to the organization, evaluation and marshalling of such evidence, is by nature a police activity and is not entitled to absolute immunity). When a prosecutor sets out to gather facts and evidence prior to bringing charges against a suspect, she is serving not as an advocate trying to win her case but as an investigator trying to understand whether a crime occurred and who did it.

Whether it is a police officer or a prosecutor who procures evidence prior to the filing of formal charges, the same standard of immunity should apply to each. *See Buckley*, 509 U.S. at 276. It does not change the analysis that prosecutors may use the evidence they themselves procured in deciding whether to bring charges or how to try a case against a defendant. Even though "[a]lmost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute," this Court has "never indicated that absolute immunity is that expansive." *Burns*, 500 U.S. at 495. Instead, the Court in *Buckley* explained that where a prosecutor "performs the investigative functions normally performed by a detective or police officer," it is neither "appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Buckley*, 509 U.S. at 283-84 (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th

Cir. 1973) (internal quotation marks omitted)). Nor can a prosecutor "shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial," otherwise, every prosecutor might try to insulate herself from liability for constitutional wrongs by ensuring that the case goes to trial. *Buckley*, 509 U.S. at 276.

The underlying rationale for the equal treatment of police officers and prosecutors who perform investigative functions is straightforward and concerns the divergent purposes of investigative activity and trial advocacy. A prosecutor is performing a qualitatively different function in the criminal justice system than her traditional role as courtroom advocate when she investigates a crime before the filing of charges. The investigative role requires a disinterested mode of fact-gathering and weighing of evidence; the role of trial advocate involves persuading a jury by presenting the assembled facts in the strongest light possible within the legal and ethical confines of an adversarial proceeding. As this Court noted in *Buckley*:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.

509 U.S. at 273 (quoting *Hampton*, 484 F. 2d at 608, cert. denied, 415 U.S. 917 (1974)).

The prosecutor's trial role, her role as advocate and persuader, merits the protection of absolute immunity precisely because it is so different from the performance of traditional investigative functions. *See Burns,* 500 U.S. at 478; *Forrester v. White,* 484 U.S. at 224. Trial advocacy requires the prosecutor to use independent judgment in presenting a strong case to a jury. The prosecutor's role in the post-indictment stage is to persuade neutral arbiters that the defendant is guilty of the crimes alleged. A prosecutor fearing potential civil liability for her trial advocacy may tread too cautiously in the courtroom, thereby skewing the delicate balance of the adversarial proceedings that are grounded in zealous representation of both parties. Traditional investigative activities, by contrast, are intended to be different in kind from advocacy. The essential purpose of a criminal investigation at the pre-indictment stage is to discover the facts so that the prosecutor may make an informed decision about whether to pursue charges. There is scant room for advocacy at the fact-gathering stage, and investigators, whether they happen to be prosecutors or police officers, are expected to proceed with a measure of objectivity that one does not expect or encourage during an adversarial trial proceeding. *See Buckley*, 509 U.S. at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.") (footnote omitted). In short, the investigation is the time to gather the

facts, the charging determination is the time for a clear-eyed assessment of those facts, and the trial is the time to convince the jury that the facts support the charges beyond a reasonable doubt.

In a critical sense, then, the reliability of the investigation serves as the foundation for the integrity of subsequent charging decisions and the adversarial proceedings before the grand jury and at trial. Qualified immunity at the pre-indictment stage is crucial to preserving this integrity by helping ensure that prosecutors understand their proper roles at different stages in a criminal investigation and prosecution. If they choose to take on investigative functions, prosecutors should serve as objective fact-finders, not as advocates. It is only after they (or the police officers and other law enforcement officials working with them) have properly discharged these investigative functions that they receive the benefit of absolute immunity for how they subsequently use the facts and evidence in bringing charges and proving their case.

When the functions of prosecutors and police officers are the same, the immunity that protects them should also be the same. As this Court has made clear, it is an unworkable standard to afford prosecutors a higher degree of immunity simply because there is a possibility that evidence gathered during an investigation may later be used at trial. *See Buckley*, 509 at 276. Prosecutors who act as investigators prior to filing formal charges are not serving in an advocacy role and should not have absolute immunity from liability for their actions in such circumstances. *Id.* at 259. In sum, there is no

reason to believe that prosecutorial discretion would be threatened by encouraging prosecutors to understand, and act in accordance with, their proper role at the investigative stage.

B. Qualified Immunity Provides Robust Protection to Prosecutors

Qualified immunity has been characterized by this Court as providing "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Contrary to Petitioners' and their *amici's* arguments, absolute immunity is not required to prevent frivolous litigation, nor to protect the judicial process. Absolute immunity is unnecessary to protect the ethical prosecutor at the investigative stage because the difficulty of establishing a cause of action and defeating a defense of qualified immunity will protect all but the most incompetent or willful wrongdoers. *See* Margaret Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 55 (2005).

Significantly, certain tactics deemed essential to law enforcement are not undermined by use of the qualified immunity standard. *See, e.g., Cruz v. Kauai County*, 279 F.3d 1064, 1069 (9th Cir. 2002) (prosecutor who signed affidavit to secure arrest warrant without investigating truthfulness of allegations made by third party was entitled to qualified immunity); *Manetta v. Macomb County Enforcement Team*, 141 F.3d 270, 274-75 (6th Cir. 1998) (prosecutor entitled to qualified immunity for advising police to conduct an arrest in absence of

probable cause, because prosecutor could have reasonably believed that Plaintiffs' conduct constituted extortion under Michigan law, while in actuality Plaintiffs were engaged in legal activity). Defeating the qualified immunity defense is usually an insurmountable challenge. Specifically, under a qualified immunity regime, the victim of misconduct can maintain an action only by proving that the prosecutor violated clearly established statutory or constitutional law that a reasonable person in the prosecutor's position would have been aware of. *See Harlow*, 457 U.S. at 818. For example, this Court recently reaffirmed the robust protections of qualified immunity in holding that public school officials were protected from liability for conducting unconstitutional strip searches of students because established law did not clearly show that such searches violated the Fourth Amendment. *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009). At the same time, qualified immunity – unlike absolute immunity – does not shield clearly outrageous conduct. *See e.g., Hope v. Pelzer*, 536 U.S. 730 (2002) (officials not entitled to qualified immunity where they handcuffed inmate to hitching post on two occasions, one of which lasted for seven hours without water or bathroom breaks, because they were on notice that their conduct violated established law); *Doe v. Phillips*, 81 F.3d 1204, 1211-1212 (2d Cir. 1996) (prosecutor not entitled to qualified immunity for claims that he violated Plaintiff's First Amendment rights when he demanded that Plaintiff swear to her innocence on a bible in a church as a condition of dropping charges that she had sexually abused her son); *Orange v. Burge*, 2008 WL 4443280 *10 (N.D. Ill. 2008)

(prosecutor not entitled to qualified immunity where he was personally involved in coercive interrogation and then coached the suspect to deliver a false confession in exchange for bringing an end to the violent interrogation).

Moreover, the qualified immunity defense has been strengthened in the years since *Imbler* to provide a complete defense at the earliest stages of litigation for all but the most inexcusable misconduct. This Court has replaced the common-law subjective standard of good faith with an objective standard which allows liability only where an official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Burns*, 500 U.S. at 494 n.8 (quoting *Harlow*, 457 U.S. at 818). This change was designed to avoid extensive disruption of government functions and resolve many insubstantial claims on summary judgment. *Id.*; *see also Malley*, 475 U.S. at 341, and *Anderson v. Creighton*, 483 U.S. 635, 645 (1987)). Additionally, in *Imbler*'s wake, when a government official raises the qualified immunity defense, discovery on other issues is stayed until the immunity issue is resolved by a motion to dismiss or a motion for summary judgment. *See Harlow*, 457 U.S. at 818. Should a trial court reject a qualified immunity defense, government officials are afforded the right to an immediate interlocutory appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-530 (1985); *see also Anderson*, 483 U.S. at 646 n.6.

State practice provides further evidence that qualified immunity affords prosecutors sufficient

protection to perform their functions effectively and independently. A number of jurisdictions provide only qualified immunity for state and local officials who acted without malice and were performing discretionary acts within the scope of their duties. *See e.g., Shellburne, Inc. v. Roberts*, 238 A.2d 331 (Del. 1967); *Medeiros v. Kondo*, 522 P.2d 1269 (Haw. 1974); *Towse v. State*, 647 P.2d 696 (Haw. 1982); *Bone v. Andrus*, 527 P.2d 783 (Idaho 1974); *Robinson v. Board of County Commissioners*, 278 A.2d 71 (Md. 1971); *Sustin v. Fee*, 431 N.E.2d 992 (Ohio 1982); *Utah State University v. Sustro & Co.*, 646 P.2d 715 (Utah 1982). For example, Vermont's doctrine of official immunity recognizes two degrees of immunity – absolute immunity shields judges, legislators, and the state's highest executive officers in cases where the conduct was performed within their respective authorities; qualified immunity, on the other hand, protects lower-level officers, employees, and agents so long as they 1) reasonably believed they were acting within the scope of their authority; 2) acted in good faith; and 3) were performing discretionary acts. *See Levinsky v. Diamond*, 559 A.2d 1073 (Vt. 1989) (applying qualified immunity standard to state assistant attorneys general for discretionary acts including subpoenaing records, filing charges, pursuing a federal warrant, and making statement at a bail hearing); *see also Ross v. Consumers Power Consumers Power Co.*, 363 N.W. 2d 641 (Mich. 1984) (applying only qualified immunity to lower level officials, including prosecutors, for all discretionary acts performed within the scope of duties and in good faith). The longstanding immunity doctrines in these states demonstrate that qualified immunity is

a perfectly workable standard, and there is no indication that the application of this standard unduly limits prosecutors in the performance of their duties.

C. Qualified Immunity is the More Workable Standard in the Absence of Meaningful Alternative Deterrents to Prosecutorial Misconduct

One of the key premises of *Imbler* was that sanctions such as professional discipline and criminal punishment would provide a meaningful alternative deterrent to unconstitutional action by prosecutors, and that their constitutional violations are more likely to be detected and corrected than those committed by other government officials. *See Imbler*, 424 U.S. at 426; *Cf. Mitchell*, 472 U.S. at 522-23 ("officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed...and the judicial process is largely self-correcting"). However, empirical studies of these alternative safeguards – including appellate review of claims of misconduct, judicial reporting of acts of misconduct, state bar disciplinary actions, statewide codes of professional conduct, as well as internal systems of accountability within prosecutor's offices – suggest that such alternatives do little to deter misconduct or provide meaningful remedies, largely because they are rarely invoked. *See* Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L. J. 1509, 1514 (2009).

Recent studies show that prosecutors are rarely disciplined or criminally prosecuted for their misconduct, and that their victims are generally denied any civil remedy because of prosecutorial immunities. This is so not because disciplinary proceedings usually result in the exoneration of the accused prosecutors, but because disciplinary proceedings are rarely instituted against prosecutors in the first place. In 2003, the Center for Public Integrity conducted a comprehensive study of prosecutorial misconduct which examined 11,452 cases since 1970 in which appellate courts reviewed charges of prosecutorial misconduct. *See* Johns, 2005 B.Y.U. L. REV. at 60 (citing to Center for Public Integrity, Harmful Error: Investigating America's Local Prosecutors 45-47, app. at 109-09 (2003); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 278 (2007). In the overwhelming majority of cases, the alleged misconduct was either not addressed or ruled to be harmless error. *Id.* Prosecutorial misconduct by state and local prosecutors resulted in the dismissal of charges, reversal of convictions or reduction in sentences in over 2000 cases, and of these, prosecutors were disciplined in only forty-four cases and were never criminally prosecuted. *Id.* Another study found that between 1886 and 2000, on average less than one disciplinary proceeding was brought against prosecutors per year nationally. *See* Johns, 2005 B.Y.U. L. REV. at 70-71. It is even extremely rare that an appellate court will name in its published opinion a prosecutor who the court has determined committed misconduct. *See* Adam M. Gershowitz,

Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct, 42 U.C. DAVIS L. REV. 1059, 1062 (2009). Perhaps most disturbing is the possibility that the vast majority of the most egregious and extreme misconduct evades any form of review and correction.

Nor is there evidence that discipline from state bar associations has been effective in deterring prosecutors from engaging in misconduct. Studies recently completed by the California Commission on the Fair Administration of Justice (CCFAJ) concluded that there were 443 reported decisions between 1998 and 2008 in which courts cited prosecutors for misconduct. *See* CCFAJ, *Reports and Recommendations*, *available at* http://www.ccfaj.org/reports.html (last visited September 15, 2009). In 53 of these cases, convictions were reversed and California judges were required, by law, to refer the prosecutors to the State Bar for discipline. *Id.* Yet, despite this requirement, judges did not refer a single case for discipline. *Id.* The CCFAJ report further shows that upon review of all of the prosecutorial misconduct cases, some of the offending prosecutors had been cited by the courts for engaging in the same misconduct more than once without any subsequent bar disciplinary action. *Id.*

The safeguard of potential civil liability for misconduct at the investigative stage, subject to the defense of qualified immunity, is vital to ensure the integrity of the criminal justice system. Alternatives to potential civil liability simply do not provide a meaningful enough deterrent to abuse of prosecutorial power. Extending absolute immunity

to the investigative conduct at issue in the instant case would eliminate a limited but essential civil remedy for victims of intentional and serious misconduct by prosecutors. Qualified immunity at the investigative stage offers robust protection and would protect prosecutors against all but the most egregious acts, those which merit a remedy to preserve justice and provide some measure of recourse.

II. Conferring Absolute Immunity for Investigative Acts Would Create the Wrong Incentives for Prosecutors Regarding Charging Decisions and Skew Prosecutors' Incentives Regarding Structuring Their Offices

A. Extending Absolute Immunity Would Create Improper Incentives for Prosecutors Deciding Whether to Charge an Individual With a Crime

The rule proposed by Petitioners and their *amici* would have a perverse and damaging effect on prosecutorial incentives in making charging decisions. Prosecutorial discretion to decide whether to pursue charges against an individual is a critical element of our criminal justice system. It affords the prosecutor an opportunity to use her considered and independent judgment to weigh the evidence and assess the likelihood of conviction prior to engaging the full powers of the State to pursue an individual for an alleged crime.

A prosecutor who has investigated a crime will often have principal responsibility for making

the decision regarding whether to charge an individual. If the prosecutor does not charge the individual, her investigative conduct would be subject to qualified immunity as provided in *Buckley*. Under the rule advocated by Petitioners in this case, however, the prosecutor who *does* charge the individual will receive the shield of absolute immunity not just for all trial-related conduct going forward, but also *retroactively* for all investigative-stage conduct related to trial.[2] Thus, if the prosecutor is concerned a violation of a suspect's statutory or constitutional rights may have occurred during the course of the investigation, a sure way to insulate herself from civil liability would be to charge the suspect with a crime. On the theory proposed by Petitioners and their *amici*, the mere decision to charge will extend absolute immunity both forward and backward in time to give a prosecutor complete protection from civil liability. In fact, the more egregious the misconduct by the prosecutor, the stronger her incentive may be to bring charges to avoid liability. Our notions of justice would be stood on their head, as unethical prosecutors would have a deeply personal incentive to bring charges in the weakest cases where they

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[2] The prosecutor's incentives would obviously be different if the Court holds that there can be no violation of individual rights without a trial taking place. In that case, the decision to charge an individual would not present any advantage from the standpoint of immunity because a decision not to charge would cut off any possibility of liability in that no violation of rights has taken place. For reasons set forth at length in the Brief for Respondents, such a position should be rejected. Resp. Br. at 24-27.

may have falsified evidence to "prove" a suspect's guilt at trial. The standard sought by Petitioners and their *amici* would do little other than distort the ethical exercise of prosecutorial discretion upon which much of our criminal justice system rests.

Prosecutorial discretion is an inherent part of the Executive Power. Although prosecutors are required to have probable cause to bring charges against an individual, and are barred by the Equal Protection Clause from targeting individuals for prosecution for reasons of race or religion, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the fact that prosecutorial discretion is an intrinsically Executive calculation makes its exercise largely unreviewable by courts. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citing cases); *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 807 (1987); *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing cases). Because there is relatively little independent oversight of a prosecutor's decision to charge an individual with a crime—one of the most consequential decisions a government official can ever make—it is imperative that the immunity doctrines that apply to prosecutorial conduct not reward an unethical prosecutor with retrospective immunity for making the decision to bring charges. The temptation in a close case to charge an individual, or one that is not close but depends on falsified evidence to establish the suspect's guilt, and thereby obtain absolute immunity for conduct that has already taken place, would likely prove irresistible to unethical prosecutors.

B. Applying Absolute Immunity in this Case Would Skew Prosecutors' Incentives Regarding the Allocation of Prosecutorial Functions Within Their Offices

The constitutional standard for immunity should not skew prosecutors' incentives regarding their choice between horizontal (those where investigative and adjudicative responsibilities are performed by separate teams of prosecutors) and vertical (those where such responsibilities reside in one actor) prosecution models. The expansion of absolute immunity disfavors the horizontal model and creates strong incentives for jurisdictions to adopt a vertical model. While we do not take a position on the relative merits of each model, we do observe that some experts, including the American Bar Association, believe that a horizontal structure offers significant benefits absent from a purely vertical one. *See* ABA Criminal Justice Section: Standards On Prosecutorial Investigations, Standard 1.2(e) (2008) (hereinafter, "ABA Standards") (Standard 1.2(e) cites the general principle that "[g]enerally, the prosecutor engaged in an investigation should not be the sole decision-maker regarding the decision to prosecute matters arising out of that investigation."); *see also* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000).

Proponents of the horizontal model argue that the combination of law enforcement and adjudicative functions vests prosecutors with a significant amount of largely unchecked power. Barkow, 61 STAN. L. REV. at 876. Armed with the unfettered discretion to charge defendants using a growing body of criminal laws that carry a wide range of potential sentences and penalties, and exercising significant leverage over defendants to obtain pleas and cooperation, prosecutors are empowered in many instances to judge their own cause for all intents and purposes. *Id.* at 882-83; *see also* Uviller, 68 FORDHAM L. REV. at 1699. Prosecutors who investigate a case, proponents of the horizontal model contend, are intimately tied to the procurement of the evidence and thus may be less suited than a prosecutor not involved in the investigation to determine whether the evidence gathered is sufficient to prove a suspect's guilt beyond a reasonable doubt. *See* ABA Standards; *id* at 883. Similarly, prosecutors who switch gears from investigator to trial advocate in the same case may not be well disposed to make adjudicative decisions without imposing their own self-interest. *See* Uviller, 68 FORDHAM L. REV. at 1716. There is the risk that improper factors and personal biases will motivate decision-making. *See Armstrong*, 517 U.S. at 476 (Stevens, J., dissenting) ("[T]he possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1523-37 (1981).

Extending absolute immunity to pre-indictment investigative conduct that is connected to evidence later introduced at trial would encourage prosecutor's offices to adopt a vertical model of prosecution. Under this standard, a prosecutor who gathered evidence during the investigative stage would have a strong incentive to remain the principal decision-maker in evaluating whether to bring charges and what evidence to use against a defendant, and thereby retroactively receive absolute immunity for her conduct in procuring evidence that she herself decides to use in the grand jury or at trial. To be sure, there are important benefits to vertical prosecution, including efficiency and consolidation of knowledge in one person for the purpose of subsequent disclosure decisions. But the choice between vertical and horizontal models should not be skewed by the immunity standard that applies to investigatory conduct.

Application of qualified immunity to investigative conduct and an absolute immunity to advocatory conduct, by contrast, frees prosecutors to make decisions about the structure of their offices based on what best accomplishes their mission of law enforcement and the fair administration of criminal justice, and recognizes the different purposes of and different roles played by prosecutors at each stage of a criminal investigation and prosecution. This Court should take note of the consequences of extending the reach of absolute immunity for the incentives of prosecutor's offices to choose one model of prosecution over another.

CONCLUSION

Qualified immunity is the appropriate standard by which to evaluate the potential liability of prosecutors for their performance of investigative functions prior to the bringing of formal charges against a suspect. Petitioners' and their *amici's* proposal to expand absolute immunity to shield prosecutors' investigative conduct from scrutiny finds no support in the text of § 1983, this Court's precedent, or the public policy concerns that animate immunity doctrines for public officials. We urge this Court to affirm the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA, JOSEPH HRVOL, AND DAVID RICHTER,

Petitioners,

v.

CURTIS W. MCGHEE, JR. AND TERRY J. HARRINGTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATES OF COLORADO, ARKANSAS, DELAWARE, IDAHO, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

The States have a paramount interest in the vigorous investigation and prosecution of criminal offenses. Absolute prosecutorial immunity furthers that interest by allowing prosecutors to perform their prosecutorial functions without fear that they will be held personally liable based upon the performance of their duties. The Eighth Circuit's decision in this case undercuts this immunity by allowing disgruntled criminal defendants to plead around it whenever a prosecutor allegedly has interviewed a witness during the investigatory phase of a criminal proceeding. If adopted, this decision will discourage prosecutors from participating in investigative interviews and from presenting testimony at trial from individuals that they have interviewed, thereby impairing the State's interest in both the investigation and prosecution of crime. Accordingly, the States filing this brief urge the Court to overturn the decision below.

Amici agree with petitioners that respondents cannot state a valid claim based upon the mere preparation of false testimony and that respondents' claim for the use of allegedly false testimony at trial is plainly barred by absolute prosecutorial immunity. *Amici* also maintain that, even if respondents could state a valid claim based upon the mere preparation of false testimony, absolute prosecutorial immunity would bar them from seeking damages resulting from the presentation of that testimony at trial. *Amici* submit this brief to inform the Court how permitting such claims would adversely affect prosecutorial functions and why therefore claims seeking damages for injuries caused by a prosecutor's

presentation of witnesses at trial are barred, whether or not prosecutors interviewed the witnesses before trial.

INTRODUCTION AND SUMMARY

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court held that prosecutors should be afforded absolute immunity against claims for damages based upon the alleged presentation of false testimony at trial because such claims distort prosecutorial decision making and the administration of justice. In this case, respondents tried to plead around absolute prosecutorial immunity by alleging that prosecutors coerced a witness into giving false testimony in an interview during the investigative phase of a criminal proceeding and that this testimony was subsequently presented at trial. Respondents, however, are still seeking damages from the convictions that allegedly were caused by presentation of false testimony at trial, and therefore their claims have the same distorting impact on the prosecutorial function and the administration of justice as a direct challenge to the presentation of false testimony at trial. In addition, if permitted, claims such as respondents' would discourage prosecutors from participating in investigative interviews, which would distort prosecutorial decision making in other ways and deprive witnesses, defendants, and law enforcement officers of the benefits of prosecutorial participation in such interviews. As a consequence, absolute immunity should bar claims seeking damages caused by the presentation of testimony at trial, no matter what theory of liability has been pled.

As this Court has recognized, official immunity "reflects 'a balance' of 'evils.'" *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 859 (2009) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.)). On the one hand, immunizing government officials against claims for damages deprives criminal defendants who have been genuinely wronged by dishonest or malicious government officials of compensation for their injuries. On the other hand, permitting claims against government officials for damages caused by performance of their duties creates a threat of personal liability that chills officials in conducting their official duties, thereby depriving the public of the vigorous performance of government functions.

The balance between these two evils generally has been struck by affording government officials a "qualified" immunity that protects officials so long as they do not violate "clearly established statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("Qualified immunity represents the norm for executive officers."). However, where claims challenge conduct that is "'intimately associated with the judicial phase of the criminal process,'" *Van de Kamp*, 129 S. Ct. at 860-61 (quoting *Imbler*, 424 U.S. at 430), prosecutors are afforded greater protection—absolute immunity against suit—to ensure that fear of personal liability does not deter them from making the often difficult decisions demanded by their prosecutorial functions. *Van de Kamp*, 129 S. Ct. at 860-61; *Imbler*, 424 U.S. at 424-30.

Prosecutors should not be stripped of absolute immunity and subjected to claims for damages caused by the testimony of witnesses presented at trial simply because those witnesses were interviewed during the investigative phase of a criminal proceeding. Prosecutors frequently are involved in investigative activities such as witness interviews, and this involvement enhances the performance of their prosecutorial functions. When prosecutors interview witnesses, they are better able to perform two key prosecutorial functions: making charging decisions and presenting the Government's case at any eventual trial.

Witnesses and defendants also benefit when prosecutors participate in investigative interviews because the prosecutors' presence gives the rights of witnesses and defendants an extra layer of protection. Law enforcement officers also benefit because, among other things, the presence of prosecutors ensures that officers are advised on any unusual legal issues that may arise. If prosecutors could be sued for damages resulting from the presentation at trial of witnesses interviewed during the investigative phase, prosecutors understandably would be reluctant to participate in such interviews, and the many benefits of their participation would be lost in whole or in part.

By basing their claim upon the prosecutors' conduct in interviewing witnesses prior to trial rather than on presenting those witnesses, respondents have not altered the chilling effect that claims for damages caused by the presentation of evidence at trial have on the prosecutorial function. In *Imbler*, this Court held that prosecutors should

enjoy absolute immunity for conduct intimately associated with the judicial process because the threat that they will be held liable for one of the many difficult decisions that must be made in presenting evidence at trial would discourage prosecutors from vigorously performing their duties. This threat of personal liability, and its distorting impact on prosecutorial decision making, is not eliminated by simply modifying the pleadings to assert a constitutional violation that led to the presentation of false testimony at trial rather than a violation in the presentation of the testimony itself. Thus, whatever constitutional violation is pled, prosecutors should be afforded absolute immunity against claims seeking damages allegedly caused by the presentation of evidence at trial.

ARGUMENT

PROSECUTORS SHOULD BE ABSOLUTELY IMMUNE FROM CLAIMS FOR DAMAGES CAUSED BY THE TESTIMONY AT TRIAL OF WITNESSES INTERVIEWED DURING THE INVESTIGATIVE PHASE OF A CRIMINAL PROCEEDING.

A. Prosecutorial Participation In Investigative Interviews Improves Prosecutorial Functions, Protects Witnesses And Defendants, And Benefits Law Enforcement Officers.

Respondents seek to evade the absolute immunity that protects the prosecutorial function by alleging that the prosecutors in this case coerced a witness during an interview in the investigative phase of the proceedings. It is not, however, unusual for

prosecutors to participate in the "investigative" phase of criminal proceedings, which generally occurs before there is probable cause sufficient to initiate judicial proceedings against an individual. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993). Sometimes prosecutors handle criminal investigations themselves, usually through criminal investigators assigned to their offices.[1] At other times, prosecutors' direct criminal investigations

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[1] *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.1, at 48 (3d ed. 1993) (noting that prosecutors may be primarily responsible for investigating a crime "because the area of illegal activity is not one that attracts law enforcement interest, as in the case of certain commercial frauds, or where law enforcement officials are themselves involved"); *see also* ALA. CODE § 12-17-216 (2009) (authorizing district attorneys to "conduct investigations"); CAL. GOV'T CODE §§ 12550, 12560 (2005) (permitting Attorney General to take charge of investigations); COLO. REV. STAT. § 20-1-209(1) (2005) (authorizing district attorneys to appoint investigators); IND. CODE § 33-39-4-1 (2004) (authorizing prosecuting attorneys to employ special investigators); LA. REV. STAT. ANN. § 16:13.1 (2001) (authorizing district attorneys to employ special investigators); ME. REV. STAT. ANN. 30-A § 290 (2001) (authorizing district attorneys to appoint investigators); NEV. REV. STAT. § 252.070 (2009) (authorizing district attorneys to appoint "investigational" staff); N.C. GEN. STAT. ANN. § 7A-69 (2009) (providing for "investigatorial assistants"); OKLA. STAT., tit. 19, § 215.35A(A) (2000) (providing for "district attorney investigators . . . under the direction of the district attorney"); ETHICS COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASS'N, PROFESSIONALISM: A SOURCEBOOK OF ETHICS AND CIVIL LIABILITY PRINCIPLES FOR PROSECUTORS at III-8 (2001) (noting that "the investigation and gathering of evidence relating to criminal offenses is the prosecutor's responsibility") (quotation omitted).

conducted by law enforcement officers.[2] Most often, however, criminal matters are investigated by the police or other law enforcement personnel, and prosecutors assist such personnel in the investigation.[3] Moreover, the participation of prosecutors in investigative activities and in investigative interviews in particular has important benefits for prosecutors and others involved in criminal investigations.

Specifically, when prosecutors participate in investigative interviews, their ability to perform

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[2] In some states, prosecutors are required to direct homicide investigations. *See, e.g.*, OR. REV. STAT.. § 146.100(1) (2009) ("Death investigations shall be under the direction of the district medical examiner and the district attorney for the county where the death occurs."); *see also* ME. REV. STAT. ANN. 5 § 200-A (2002) (conferring upon Attorney General authority to direct homicide investigations). In some states, prosecutors also are authorized to assume control of investigations into other offenses. *See, e.g.*, ME. REV. STAT. ANN. 30-A § 289 (1996) (authorizing district attorneys to direct investigations into child abuse). In addition, in states such as Pennsylvania, prosecutors are, in practice, solely responsible for managing investigations into economic crimes.

[3] Many States explicitly authorize or require prosecutors to assist law enforcement officers in the investigation of criminal offenses. *See* GA. CODE ANN. § 15-18-6(7) (2009) (imposing duty upon district attorneys "[t]o advise law enforcement officers concerning . . . matters relating to the investigation and prosecution of criminal offenses"); N.C. GEN. STAT. ANN. § 7A-61 (2009) (requiring a district attorney to "advise the officers of justice in his district"). In addition, in many states, prosecutors actively assist police in criminal investigations and even participate in reviewing crime scenes for offenses such as homicide. Prosecutors likewise often take an active role in investigating shootings by active duty officers and other special situations.

their prosecutorial functions is improved because they are able to make more efficient and informed charging decisions and to examine individuals that they have interviewed more effectively at trial. In addition, when prosecutors participate in interviews, their presence provides an extra layer of protection for the rights of both witnesses and defendants. Finally, law enforcement officers benefit from the involvement of prosecutors in investigative interviews because the presence of prosecutors protects officers from inadvertently violating the rights of witnesses and defendants and insulates the officers against unfounded claims of misconduct.

1. Improvement of Prosecutorial Functions

When prosecutors participate in investigative interviews, their ability to perform two key prosecutorial functions—charging criminal offenses and presenting the State's case at trial—is improved.

First, when prosecutors participate in investigative interviews, they are better able to perform a key prosecutorial function: determining whether to charge individuals suspected of criminal offenses and deciding what charges to bring against them. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.4(a), at 59 (3d ed. 1993) ("The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor."). Particularly where broad investigations are conducted or the potential offenses being investigated are complex, there may be an array of potential targets and charges. By participating in interviews early in an investigation,

prosecutors can ensure that the investigation is informed by consideration of the applicable law and focused upon producing evidence helpful to the charging and trial process. In addition, by participating in interviews of key subjects and witnesses, prosecutors are better able to determine the roles played by participants in a crime or criminal activity, which helps prosecutors to determine whether to bring charges against certain individuals and the most appropriate charges to bring.

Participation in investigative interviews also helps prosecutors to gauge the strength of the testimony of potential witnesses. When prosecutors are able to observe a potential witness's demeanor and probe his or her story, they are better able to judge how strong that witness's testimony at trial would be. Reading a witness statement or the summary of a witness interview is not the same as sitting face to face with a witness and assessing the witness's demeanor and credibility. This additional information improves a prosecutor's ability to determine whether to bring charges. By contrast, where a witness provides a suspect with an alibi or otherwise exculpates the suspect, a prosecutor that has interviewed the witness in person is better able to judge the strength of the witness's testimony and decide that charges should not be filed. Indeed, it is not unusual for a prosecutor that has filed charges against an individual to drop those charges after interviewing an alibi witness.

Second, prosecutors who participate in investigative interviews are better able to examine witnesses at trial. Just as depositions facilitate the

presentation of civil trials, interviews with potential witnesses facilitate the presentation of criminal cases because witness interviews allow prosecutors to "become familiar with the personality of the witness," which enables prosecutors to "anticipate how the witness will react on the stand" and thus makes prosecutors "better able to conduct cross-examination or to decide whether to cross-examine at all." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.1, at 52.

Although prosecutors interview some witnesses after charges have been brought in preparation for trial, that is not always possible. Some witnesses who were willing to be interviewed during the investigative phase may balk at doing so after charges are brought, for example, because they learn who has been charged and become scared about cooperating. Or, the witness may be sympathetic to the defendant and willing to be interviewed before charges are brought in hopes of heading off such charges. Once, however, charges are brought, the witness may refuse to assist the prosecution by submitting to an interview. In addition, witnesses may not be available for later interviews because they are ill and may become unable to testify, because their memory may dim, or because their age or mental capacity makes them subject to undue influence of others. *See* BETTY R. BROWN, THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE 28-29 (1977). In such cases, a prosecutor's only real opportunity to interview a witness may be in the investigative phase.

2. Protection Of Witnesses And Defendants

The participation of prosecutors in investigative interviews also provides an additional layer of protection for the rights of witnesses and defendants.

For example, although law enforcement officers presumably are aware of the requirements of *Miranda* and the prohibition against coercing testimony from witnesses, *see, e.g., United States v. Serrano*, 406 F.3d 1208, 1216 (10th Cir. 2005); *Buckley v. Fitzsimmons*, 20 F.3d 789, 794 (7th Cir. 1994), the presence of a prosecutor can help to ensure that those rights are respected. A prosecutor's participation may be even more beneficial—if not crucial—when more complex issues such as ambiguous waivers or invocations of the right to counsel, *see, e.g., Davis v. United States*, 512 U.S. 452, 458-462 (1994); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), or questions of confidentiality and privilege arise. *See also* BROWN, THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE 34-35 (noting the importance of having prosecutors present at lineups and other identification procedures). In these situations, a prosecutor present at an investigative interview can advise law enforcement officers and thereby ensure that the officers do not inadvertently violate the rights of witnesses.

The rights of defendants also receive extra protection when prosecutors participate in investigative interviews. Criminal defendants have the right to disclosure of exculpatory evidence as well as evidence that impeaches the credibility of witnesses presented by the Government, *see Giglio v.*

United States, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963), and they may request prior statements of any witness presented at trial, *see* 18 U.S.C. § 3500(b). Although law enforcement officers are aware of these obligations, prosecutors have a greater incentive to ensure that they are satisfied because prosecutors are responsible for making the required disclosures and, in fact, can be disciplined or sanctioned for failing to do so. *See, e.g., United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992); *United States v. Starusko*, 729 F.2d 256, 264-65 (3d Cir. 1984). Accordingly, when prosecutors are present during an investigative interview, they are more attentive to whether impeachment material has been created and more likely to ensure that such materials are properly memorialized and disclosed. Thus, prosecutorial participation in investigative interviews benefits defendants as well as witnesses.

3. Benefits To Law Enforcement Officers

Finally, law enforcement officers benefit from the involvement of prosecutors in investigative interviews. First, as discussed above, *see supra* pp. 8-9, when prosecutors participate in interviews of key witnesses early in the investigative process, they are better able to ensure that the investigation is focused, to determine whether the investigation should be continued and, if so, which avenues should be followed, what targets pursued, and what evidence collected. As a result, the work of the law enforcement officers involved in the investigation is more efficient and productive. Second, as also noted above, *see supra* p. 11, the presence of prosecutors in investigative interviews ensures that officers are

properly advised on the rights of witnesses and defendants, which protects officers against inadvertent violations of those rights and suits resulting from such violations. Third, the presence of prosecutors protects officers against unfounded claims of misconduct by providing credible, independent witnesses to the interviews.

B. Prosecutors Will Be Reluctant To Participate In Investigative Interviews If They May Be Sued For Damages Caused By The Testimony Of Individuals They Interviewed.

If prosecutors could be sued for damages caused by the testimony of witnesses that they interviewed, many of the benefits of prosecutors participating in investigative interviews would be lost because prosecutors would be reluctant to participate. Prosecutors normally are not required to participate in interviews in the investigative phase of a criminal proceeding, and they can perform their charging and trial functions (albeit not as effectively or efficiently) without doing so. As a consequence, if participating in such interviews created the risk of personal liability, rational prosecutors would not participate in many, if not all, investigative interviews,[4] and the

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[4] *See, e.g.*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 82 (2d ed. 1991) ("The prosecuting attorney may be restricted from any active participation in the police function by the threatened loss of immunity to civil damages in instances where participation is beyond the scope of advisor and, therefore, not an integral part of the judicial process. The prosecutor must always be cognizant that his quasi-judicial immunity afforded by the courts in civil liability suits is limited to actions taken in advancement of the traditional prosecutorial function.").

public, suspects, witnesses, and defendants alike would be deprived of the benefits of such participation.

These adverse effects weigh against permitting claims against prosecutors for damages resulting from the testimony of witnesses that they have interviewed. In balancing the evils of immunizing prosecutors against damages claims against the evils of permitting such claims, this Court has focused primarily upon the impact that permitting such claims would have on "'the public trust of the prosecutor's office' . . . were the prosecutor to have in mind his 'own potential' damages 'liability' when making prosecutorial decisions." *Van de Kamp*, 129 S. Ct. at 860 (quoting *Imbler*, 424 U.S. at 424). This Court also has considered the impact that permitting claims against prosecutors would have on the administration of justice in general. Specifically, in recognizing absolute prosecutorial immunity, this Court observed that permitting damage claims against prosecutors "would prejudice defendants in criminal cases" by making courts reluctant to provide post-conviction relief where such relief might lead to liability for prosecutors. *Imbler*, 424 U.S. at 427-28.

Permitting claims for damages resulting from the presentation at trial of witnesses who were interviewed during the investigative phase of a criminal proceeding would interfere with both the prosecutorial function and the administration of justice. First, by discouraging prosecutors from participating in investigative interviews, such claims would impair the ability of prosecutors to perform their charging function and to present the Government's case at trial. *See supra* pp. 8-10.

Second, as shown above, if prosecutors were not present during investigative interviews, the administration of justice would suffer because innocent suspects would be subject to charges that would not otherwise have been brought, *see supra* p. 9; witnesses and defendants would be deprived of a layer of protection for their rights, *see supra* pp. 11-12; and law enforcement officers would lose the advice and other benefits of prosecutorial involvement, *see supra* pp. 12-13. Moreover, the impact may be especially great in rural areas where law enforcement agencies are small, and, as a practical matter, local prosecutors may be a law enforcement officer's only source of legal advice.

C. Respondents Cannot Avoid The Public Policy Concerns Requiring Absolute Prosecutorial Immunity By Pleading Claims Based On Prosecutorial Participation In Investigative Interviews.

Even more important, respondents' pleading strategy—challenging the prosecutors' participation in an interview that allegedly led to the presentation of allegedly false testimony rather than directly challenging the presentation of such testimony—does not avoid the evils that led this Court to recognize absolute prosecutorial immunity in the first place. Whether or not a prosecutor's decision to present a witness is directly challenged, the threat that a prosecutor may be held personally liable for damages resulting from the witness's testimony has the same distorting impact on the prosecutorial function and the administration of justice. Because the purpose of absolute immunity is to protect the public interest by

avoiding such distortions, claims seeking damages caused by the presentation of a witness at trial should be barred, whatever theory of liability is pled.

As noted at the start, *see supra* p. 2, in *Imbler* this Court held that prosecutors are absolutely immune from claims for damages based upon their conduct in initiating criminal prosecution and in presenting the State's case because of the distorting impact such challenges would have on the decisions of prosecutors and the courts. *See Imbler*, 424 U.S. at 424-29. *Imbler* found that claims based upon the initiation of prosecution or the presentation of the State's case create a "substantial danger of liability" because disgruntled defendants could be expected to bring such claims against prosecutors "with some frequency," and even honest prosecutors would have difficulty in rebutting the claims. *Id.* at 425. This risk of personal liability, the Court concluded, would "prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-28. In addition, because judges may be unconsciously concerned about making decisions that subject prosecutors to personal liability, the threat of personal liability for prosecutors may influence their willingness to grant criminal defendants post-conviction relief and thereby "skew[] post-conviction judicial decisions that should be made with the sole purpose of insuring justice." *Id.* at 427-28. Finally, this Court noted, absolute prosecutorial immunity against suits for damages does not give prosecutors free reign to engage in misconduct because prosecutors are subject to professional discipline and even criminal prosecution for presenting false testimony at trial. *Id.* at 429. Accordingly, the Court

held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431.

Respondents have not eliminated any of these concerns by pleading a constitutional violation during the investigatory phase that led to the presentation of false testimony at trial rather than challenging the presentation of that testimony directly. *First*, like claims directly challenging the presentation of evidence at trial, claims such as respondents' are likely to be made with some frequency. Criminal defendants have as much incentive to sue prosecutors for improperly coercing witnesses into giving testimony as they do to sue prosecutors simply for presenting false testimony. The same damages are recoverable under either theory, and criminal defendants presumably are indifferent about which legal theory they plead. In addition, because prosecutors are required to disclose materials impeaching their witnesses as well as any prior witness statements, *see supra* pp. 11-12, defendants often know whether and when prosecutors interviewed witnesses presented at trial. In such circumstances, it is easy for criminal defendants to convert a claim that prosecutors presented false testimony at trial into a claim that misconduct in an investigative interview led to the presentation of false testimony at trial—which is no doubt why prosecutors are frequently sued for

allegedly coercing witnesses into giving false testimony at trial.[5]

Second, like claims that false testimony was presented at trial, claims that witnesses were coerced in investigative interviews to give false testimony that was later presented at trial are difficult for honest prosecutors to defend against. "Witnesses to criminal conduct are routinely either in conspiracy with the defendants or at risk of harm because they bore witness to criminal conduct." *United States v. Levenite*, 277 F.3d 454, 461 (4th Cir. 2002). As a consequence, prosecutors often are forced to use grants of immunity, plea agreements, promises of leniency in sentencing, and other inducements to obtain testimony from such witnesses. *Id.* at 461-62. The line between permissible inducements and impermissible coercion is, however, often a difficult one to draw. *Cf. Moran v. Burbine*, 475 U.S. 412, 426 (1986) (noting in the context of confessions the "fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion"). Consequently, even honest prosecutors may have

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[5] *See, e.g., Genzler v. Longanbach*, 410 F.3d 630, 633-35 (9th Cir. 2005); *Broam v. Bogan*, 320 F.3d 1023, 1027-28 (9th Cir. 2003); *Milstein v. Cooley*, 257 F.3d 1004, 1006 (9th Cir. 2001); *Zahrey v. Coffey*, 221 F.3d 342, 345 (2d Cir. 2000); *Moore v. Valder*, 65 F.3d 189, 191 (D.C. Cir. 1995); *Lee v. Willins*, 617 F.2d 320, 321 (2d Cir. 1980); *Curry v. County of Los Angeles*, 2009 WL 1684578, at *1 (C.D. Cal. June 16, 2009); *Walker v. County of Santa Clara*, 2007 WL 831822, at *1-*2 (N.D. Cal. Mar. 19, 2007); *Weinstein v. Mueller*, 563 F. Supp. 923, 926-27 (N.D. Cal. 1982); *Taylor v. Pochling*, 438 F. Supp. 914, 914-15 (E.D. Mo. 1977); *Tate v. Grose*, 412 F. Supp. 487, 487 (E.D. Pa. 1976).

difficulty defending against charges that they coerced a recalcitrant witness into giving false testimony.

Thus, by pleading that the prosecutors engaged in misconduct during an investigatve interview that led to the presentation of false testimony at trial rather than challenging the alleged presentation of such evidence directly, respondents have not eliminated either the threat that such claims will be brought or the difficulty that prosecutors will have in defending against them. As a consequence, claims such as respondents' pose a danger of personal liability even to honest prosecutors. Permitting them may "hamper a prosecutor's exercise of his judgment as to whether a certain witness should be used" and thus interfere with the prosecutorial function (*Buckley*, 509 U.S. at 284-85 (Kennedy, J., concurring in part and dissenting in part))—the primary evil that *Imbler* sought to avoid.

Third, as the National Association of District Attorneys and the National Association of Assistant United States Attorneys have pointed out, there are alternative means for deterring prosecutors from coercing witnesses into giving false testimony and then presenting it at trial. Courts provide an important check upon such misconduct because they can deprive prosecutors of any benefit from coercing witnesses by excluding testimony that is coerced, *see, e.g.*, *Malinski v. New* York, 324 U.S. 401, 430-31 (1945) (Rutledge, J., dissenting in part), or sanction the prosecutor directly, *see United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983). In addition, like prosecutors who present false testimony at trial, prosecutors who coerce witnesses into giving false

testimony are subject to grievance procedures and professional discipline that can deprive them of their license to practice as well as criminal prosecution. *See Imbler*, 424 U.S. at 429. In fact, with investigative interviews, there is an additional alternative means for deterring misconduct because a witness that is coerced by a prosecutor during an interview can sue the prosecutor for damages. *See, e.g., Doe v. Russotti*, 503 F. Supp. 942, 945 (S.D.N.Y. 1980).

In sum, there is no reason to permit criminal defendants who seek damages for the alleged presentation of false testimony at trial to evade the bar of absolute prosecutorial immunity simply by pleading that the false testimony was created in an investigative interview. The threat of damages resulting from the presentation of a witness at trial has the same distorting impact upon prosecutorial decision making (and the willingness of courts to grant post-conviction relief) when the damages are sought based upon claims of misconduct in investigative interviews with a witness as when a claim directly challenges the presentation of the witness's testimony at trial. In addition, claims based upon investigative interviews will discourage prosecutors from participating in such interviews, which interferes with prosecutorial functions and the administration of justice in other ways. The alternative means of deterring prosecutorial misconduct in this context are even greater because of the possibility of suits by coerced witnesses. Thus, absolute immunity should bar claims that seek damages resulting from the presentation of the witnesses interviewed.

It is true that absolute immunity protects only conduct that is "intimately associated with the judicial phase of the criminal process." *Van de Kamp*, 129 S. Ct. at 861 (quoting *Imbler*, 424 U.S. at 430). However, as this Court recognized in *Van de Kamp*, conduct outside of trial may be intimately connected with the judicial phase if it is "directly connected with the conduct of a trial" and requires "legal knowledge and the exercise of related discretion." *Id.* at 862. To the extent that respondents are seeking damages resulting from testimony of a witness at trial, they are challenging conduct directly connected to the conduct of a trial. The interview of the witness at issue in this case is directly connected to trial because the witness examined in that interview testified at trial, and an essential element of plaintiff's claim is that the witness gave false testimony at trial. In addition, when a prosecutor interviews a witness who is likely to testify at trial, the prosecutor uses his or her legal knowledge and discretion in determining whether that witness is being truthful and whether to present that witness at trial. Thus, under this Court's decision in *Van de Kamp*, respondents' claim involves conduct intimately associated with the judicial process to the extent that respondents are seeking damages resulting from the presentation of a witness at trial, and therefore their claim for damages is barred by absolute immunity.

This conclusion is consistent with this Court's decision in *Buckley v. Fitzsimmons*. In that case, this Court held that a prosecutor was not absolutely immune against allegations that he fabricated false evidence (there, expert testimony concerning a bootprint) during the investigative phase of a

criminal proceeding even though that evidence was eventually presented at trial. *See* 509 U.S. at 271-76; *see also id.* at 276 ("A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial . . . ."). *Buckley*, however, did not consider whether the plaintiff in that case had stated a valid claim, much less whether the plaintiff could recover damages for injuries resulting from the presentation of testimony at trial. *See id.* at 281-82 (Scalia, J., concurring) (noting that the plaintiff was unlikely to be able to state a cognizable claim based upon "the mere preparation of false evidence as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him"). As a consequence, *Buckley* did not endorse the tactics employed by respondents in this case.

Prosecutorial immunity is a practical doctrine, which affords prosecutors absolute immunity based upon the impact of claims on the prosecutorial function and the criminal justice system. Respondents should not be permitted to evade such immunity by artful pleading when the practical impact of their claim is exactly the same as a claim that this Court has found barred by absolute immunity. Instead, this Court should hold that claims that seek damages caused by presentation of evidence at trial are barred by prosecutorial immunity whatever theory of liability is pled, because such damage claims cause the same evils that led this Court to recognize absolute immunity in *Imbler*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA, JOSEPH HRVOL and DAVID RICHTER,

Petitioners,

v.

CURTIS W. McGHEE, JR. and TERRY J. HARRINGTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE COOK COUNTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then the trial prosecutor introduced that same testimony against the criminal defendant at trial.

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INTEREST OF AMICUS

Amicus is the County of Cook, Illinois, the second largest county in the United States. The State's Attorney of Cook County is the chief legal officer for Cook County and is constitutionally and statutorily charged with representing Cook County in all civil litigation. *County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 831 N.E.2d 563 (2005). Cook County is responsible for paying settlements and judgments arising from constitutional and common law tort actions against county officials. *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 787 N.E.2d 127 (2003). The federal courts have expanded this principle from *Carver* and have held that Illinois counties are liable for judgments entered against State officials whose offices are funded by the counties. *Robinson v. Sappington*, 351 F.3d 317, 339 (7th Cir. 2003) *citing Pucinski v. County of Cook*, 192 Ill. 2d 540, 737 N.E.2d 225 (2000).

In Illinois, State's Attorneys and their assistants are State officials. *Hoyne v. Danisch*, 264 Ill. 467, 470-72, 106 N.E. 341, 342, 343 (1914); *Ingemunson v. Hedges*, 133 Ill. 2d 364, 369, 549 N.E.2d 1269, 1271, 1272 (1990). The outcome of this case will impact those assistant state's attorneys who are defendants in Section 1983 claims alleging that the State's Attorney's office procured false testimony during a criminal investigation and subsequently introduced that same testimony against a criminal defendant at trial. Consequently, Cook County has an interest in the resolution of this litigation because it bears financial responsibility for paying settlements and judgments in Section 1983 actions against assistant state's attorneys in their individual capacities.

The state's attorney is the legal representative of a county. As a result, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Cook County, Illinois, therefore, respectfully submits this brief as *Amicus Curiae* in support of petitioners in accordance with Supreme Court Rule 37.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented by petitioners Pottawattamie County, Iowa; Joseph Hrvol and David Richter.

SUMMARY OF ARGUMENT

Prosecutors are absolutely immune in Section 1983 suits for damages relating to the initiation of a prosecution and presentment of the State's case. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). In *Imbler*, this Court held that prosecutors are absolutely immune from suit based upon allegations that they use perjured testimony or withheld information relevant to the defense. *Accord Van de Kamp v. Goldstein*, 129 S. Ct. 855, 861 (2009).

Relying on *Imbler*, the district court dismissed claims against prosecutors Hrvol and Richter that were based on withholding of exculpatory evidence. The district court held that petitioners were absolutely immune from suit based upon such allegations because "failure to turn over exculpatory evidence is necessarily a function intimately associated with the judicial

process." *McGhee v. Pottawattamie County*, 475 F. Supp. 2d 862, 895-896 (S.D. Iowa 2007); Pet. App. 85a. Nonetheless, the district court also held that petitioners' "claims that the prosecutors manufactured, coerced, and fabricated evidence against them is sufficient to state a substantive due process claim." *McGhee*, 475 F. Supp. 2d at 904-905. The Eighth Circuit affirmed the decision of the district court. *McGhee v. Pottawattamie County*, 547 F.3d 922, 933 (8th Cir. 2008).

In so doing, the Eighth Circuit rejected the argument that only the use of false testimony, not its mere procurement, could have violated petitioners' constitutional rights, and that the use of such testimony at trial was shielded by absolute immunity. *McGhee*, 547 F.3d at 932-933; Pet. App. 17a-18a. As the petitioners correctly observe, by "denying *qualified* immunity for *procurement* of false testimony, the courts below went further and abrogated *absolute* immunity for the *use* of that testimony *at trial*." (Petitioners' Br. at 5.) Petitioners further argue that "respondents' claims arise solely from their trials, because they have alleged that they were wrongfully convicted"[1] and that the Eighth Circuit "should not have abrogated petitioners' absolute immunity where the alleged constitutional injury was a conviction in violation of due process."[2]

Amicus agree with petitioners that: (1) *McGhee* conflicts with this Court's jurisprudence as well as *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir.

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1. Petitioners' Br. at 20.

2. Petitioners' Br. at 5.

1994) ("*Buckley II*"),[3] in that the Eighth Circuit held that "acts taken *before* trial prospectively vitiate a prosecutor's absolute immunity *at* trial," Petitioners' Br. at 20, and (2) *Buckley II* yields the better result. *Amicus* will advance two additional arguments.

First, because the use of allegedly false testimony at trial — and not the procurement of such testimony before trial — caused respondents' injury, respondents cannot establish "loss causation," a necessary element of any constitutional tort claim. As the district court recognized, petitioners are absolutely immune from suit based upon the use of false testimony at trial. *McGhee*, 475 F. Supp. 2d at 895-896

Second, the Eighth Circuit's approach places a chilling effect on prosecutors' participation in the earliest stages of a criminal prosecution. Large prosecutor's offices frequently assign prosecutors to matters upon referral or inquiry from law enforcement agencies to evaluate the assembled evidence and determine whether such evidence supports the initiation of felony charges in a particular case. Indeed, the Eighth Circuit's

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3. *See* Petitioners' Br. at 17-20. *Buckley II* recognized that "[p]rosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs." *Buckley II*, 20 F.3d at 795, *citing Buckley v. Fitzsimmons*, 509 U.S. 259, 266 n.3 (1993) and *Burns v. Reed*, 500 U.S. 478, 489-490 & n.6 (1991). *Buckley II* also recognized that "no authority [exists] for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Buckley* II, 20 F.3d at 797, *citing Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

opinion gives prosecutor offices, such as the Cook County State's Attorney's office ("CCSAO"), a profound disincentive to appear in the early stages of criminal prosecution. Such a result is contrary to what has been described as the "principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Imbler*, 424 U.S. at 435 (White, J., concurring in the judgment), *citing Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872).

The CCSAO has a Felony Review unit ("Felony Review") within its organizational structure. Prosecutors assigned to Felony Review appear early in criminal matters, evaluate evidence and determine whether charges should be filed. Felony Review is a progressive reform designed to ensure that prosecutors get involved in a potential prosecution at a point where the police have accumulated evidence and have probable cause to arrest. The participation of prosecutors at this early stage weeds out non-meritorious cases, prevents pre-trial detention in such cases and promotes judicial economy by preventing meritless criminal prosecutions before they begin. The threat of collateral litigation, including the possible imposition of punitive damages, chills the efforts of such prosecutors.

The public benefits from the vigorous operation of felony review units (or prosecutors performing similar functions) in large prosecutor's offices throughout the nation. Absolute quasi-judicial prosecutorial immunity should not be a hollow promise to prosecutors assigned

to such duties, as that would undermine the prosecutorial function that those prosecutors perform. Consequently, and for the reasons set forth below, the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed.

ARGUMENT

Respondents allege that petitioners Hrvol and Richter were prosecutors who coerced false testimony from third-party witnesses. Respondents further allege that the introduction of such testimony at trial violated their due process right to a fair trial. The procurement of the alleged false testimony did not cause respondents' injury; the use of such testimony at trial did. Respondents, therefore, cannot establish "loss causation," a necessary element of constitutional torts.

In addition, prosecutors function as a team. *See, e.g.*, *White v. City of Chicago*, 369 Ill. App. 3d 765, 777, 861 N.E.2d 1083, 1094 (1st Dist. 2006) (recognizing that the efforts of the trial prosecutors and supervisors who work with them are a "joint enterprise" and holding that a supervisor who interviewed a potential witness was absolutely immune from suit for such conduct); *see also* *Van de Kamp*, 129 S. Ct. at 862 (recognizing that trial prosecutors, their supervisors and colleagues would be absolutely immune from a suit alleging that *Brady* material should have been produced but was not). Under the Eighth Circuit's approach in *McGhee*, a prosecutor who takes a witness' statement early in the criminal process would not be absolutely immune from suit and,

yet, a trial prosecutor who introduces the statement at trial would be. *McGhee*, therefore, is not only inconsistent with *Van de Kamp* but also discourages large prosecutor's offices from early participation in the process (*i.e.*, the operation of a felony review unit for the purpose of marshalling evidence to initiate a felony prosecution and to present the case at trial). Such a result is incompatible with the public policy underlying absolute, prosecutorial immunity as set forth in *Imbler* and *Van de Kamp*.

A. The Eighth Circuit Opinion Should Be Reversed Because Respondents Cannot Establish Loss Causation And Because Their Claim Against Petitioners Regarding The Procurement Of False Testimony Is Not Actionable In Tort.

Respondents have advanced Section 1983 claims alleging that petitioners violated their due process right to a fair trial. Section 1983 "creates a species of tort liability." *Imbler*, 424 U.S. at 417. This Court has described Section 1983 "as creating a 'constitutional tort'." *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 728 (1999) (Scalia, J., concurring in part and concurring in the judgment). In this regard, "the ordinary rules of tort causation apply to constitutional tort suits." *Herzog v. Village of Winnetka*, 309 F.3d 1041, 1044 (7th Cir. 2002).

In *Bastian v. Petren Resources Corp.*, 892 F.2d 680 (7th Cir. 1990), the Seventh Circuit affirmed the dismissal of a securities fraud claim on the grounds that plaintiffs failed to allege loss causation and proximate cause. The Seventh Circuit stated that:

> "Loss causation" is an exotic name – perhaps an unhappy one (citation omitted) – for the

> standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains . . . If the defendants' oil and gas ventures failed not because of the personal shortcomings that the defendants concealed but because of industry-wide phenomena that destroyed all or most such ventures, then the plaintiffs, given their demonstrated desire to invest in such ventures, lost nothing by reason of the defendants' fraud and have no claim to damages.

Bastian, 892 F.2d at 685. The loss causation rule has been applied to constitutional tort claims for damages. *See, e.g., Niehus v. Librerio*, 973 F.2d 526, 531-532 (7th Cir. 1992) (noting that there "is no tort without an injury" and stating that this applies to constitutional torts as well as ordinary torts); *see also Zimmerman v. Cook County Sheriff's Department*, 96 F.3d 1017, 1019 (7th Cir. 1996) (stating that "[u]nless a defendant's wrong is a cause of the plaintiff's injury, there is no liability").

This Court has endorsed the interpretation of loss causation set forth in *Bastian*. *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 340 (2005) (adopting the views on loss causation expressed in *Bastian* and cases from the Second, Third and Eleventh Circuits). In *Dura*, this Court recognized that a plaintiff attempting to prove securities fraud must establish several elements, including transaction causation and loss causation. The Seventh Circuit

recently described the difference between transaction causation and loss causation:

> The distinction between 'but for' causation and actual legal responsibility for a plaintiff's loss is particularly well developed in securities cases, where it is known as the distinction between 'transaction causation' and 'loss causation.' Suppose an issuer of common stock misrepresents the qualifications or background of its principals, and if it had been truthful the plaintiff would not have bought any of the stock. The price of the stock then plummets, not because the truth is discovered but because of a collapse of the market for the issuer's product wholly beyond the issuer's control. There is 'transaction causation,' because the plaintiff would not have bought the stock, and so would not have sustained the loss, had the defendant been truthful, but there is no 'loss causation,' because the kind of loss that occurred was not the kind that the disclosure requirement that the defendant violated was intended to prevent.

Maxwell v. KPMG, LLP, 520 F.3d 713, 717 (7th Cir. 2008). Respondents claim that "but for" the procurement of the alleged coerced testimony from several witnesses, they would not have been convicted of murder. That may establish "transaction causation" but it does not establish "loss causation." In other words, the procurement of the false testimony did not cause the injury; rather, the use of such testimony at trial did.

Moreover, as petitioners have argued, the proscription against perjured testimony is a trial right. (Petitioners' Br. at 9, 10, *citing Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) and *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935).) It is the use of material, false testimony — and not any antecedent act, such as the alleged procurement of the false testimony — that violated respondents' due process rights. Respondents are not entitled to recover in tort for conduct that did not violate their due process right to a fair trial. *Carter v. United States*, 333 F.3d 791, 797 (7th Cir. 2003). In *Carter*, the Seventh Circuit stated:

> An injury resulting from the violation of a statute (or other source of a legal duty, such as the regulation concerning treatment options on which the plaintiff relies) is actionable under tort law only if the statute was intended to avert the kind of injury that occurred. In the leading case of *Gorris v. Scott*, 9 L.R.-Ex. 125 (1874), a hardy antique, the plaintiff's animals, while being transported on the defendant's ship, were washed overboard and drowned when a storm struck it. The ship was not equipped with pens that were required by a statute in order to prevent the spread of disease among the animals. Had there been pens, the animals would have been saved from a watery death. The suit for their loss was based on the statutory violation and failed because the statute was not aimed at preventing animals from being washed overboard.

Carter, 333 F.3d at 797. *See also Townes v. City of New York*, 176 F.3d 138, 148 (2nd Cir. 1999), *citing* C. Jeffries,

Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 Va. L. Rev. 1461, 1475 (1989) (concluding "that constitutional tort liability under Section 1983 is limited to 'the kind of injury that the [constitutional right at issue] was designed to prevent'").

The due process right to a fair trial is not aimed at the pre-trial procurement of false statements but instead at the use of such statements at trial. The constitutional tort claims that respondents have filed for the alleged preparation of false evidence are simply not actionable.

B. The Eighth Circuit Opinion Is Contrary To *Van de Kamp* And Discourages Prosecutors From Performing Prosecutorial Functions, Such As Interviewing Witnesses And Evaluating Evidence, During An Early Stage Of Criminal Prosecution.

In its opinion below, the Eighth Circuit held that allegations that prosecutors had coerced false testimony from witnesses that was later introduced at trial and resulted in respondents' convictions were sufficient to state a substantive due process claim against the prosecutors. *See McGhee*, 547 F.3d at 933. If affirmed, this decision would shift liability backwards —from the otherwise immune trial conduct of a prosecutor in presenting allegedly fabricated evidence to the conduct of that prosecutor leading up to trial in obtaining or preparing the evidence which caused plaintiff's injury at trial. Such a result is surely contrary to this Court's holding in *Van de Kamp* that a plaintiff could not sue the supervisors of prosecutors regarding the training

of trial prosecutors about the requirements of *Brady v. Maryland*, 373 U.S 83 (1963), where the trial prosecutors were absolutely immune from suit based upon alleged *Brady* violations.

McGhee raises substantial concerns for large prosecutor's offices such as the CCSAO, where different prosecutors perform different tasks at different stages of a prosecution from initiation to trial. It could substantially undermine the application of absolute immunity, particularly as a result of artful pleading, for those prosecutors involved most closely at the initiation stage of a prosecution, unduly inhibiting the performance of their duties and, consequently, unduly impinging on the office's function to vigorously prosecute crime.

In *Van de Kamp*, this Court recently found that a difference in the "pattern of liability," *see Van de Kamp*, 129 S. Ct. at 862, among individual prosecutors who work as a team should not defeat the immunity applicable to trial prosecutors for the violation of a trial based right, such as the failure to turn over *Brady* material. *Van de Kamp* rejected a *per se* rule that absolute prosecutorial immunity does not apply simply because a prosecutor's conduct may be characterized as "administrative." The net effect of *McGhee* is to move the basis for liability back in time from the alleged violation of respondents' rights at trial (*i.e.*, the introduction of allegedly fabricated evidence) to a time that can arguably be characterized as "investigative." *McGhee* declares that the conduct before trial (*i.e.*, the procurement of the alleged false testimony) violates respondents' substantive due process rights. Such a result effectively

narrows the immunity available under *Imbler* and, thus, subjects the prosecutors to liability.

Van de Kamp examined the practical implications of *Imbler's* functional approach where a plaintiff characterizes a prosecutor's conduct as "administrative" in the attempt to avoid the application of immunity to his or her claim based on the withholding of evidence at trial. Similarly, this case presents the practical implications of respondents' attempt to characterize petitioners' conduct as "investigative" to avoid the application of immunity to respondents' claims, as those claims are really based on the presentation of evidence at trial.

In order to illustrate the scope of absolute immunity in application to the claims in *Van de Kamp*, this Court posited a hypothetical case involving supervisory or other prosecutors, but not administration, to explain the scope of immunity as set forth in *Imbler* as it applies to individual prosecutors in a prosecutor's office. This Court stated:

> Suppose . . . [plaintiff] had brought such a case, seeking damages not only from the trial prosecutor but also from a supervisory prosecutor *or from the trial prosecutor's colleagues* – all on the ground that they should have found and turned over the [*Brady* material]. *Imbler* makes clear that *all these prosecutors would enjoy absolute immunity from such a suit.* The prosecutors' behavior, taken individually or separately, would involve "[p]reparation . . . for . . . trial," and would be

> "intimately associated with the judicial phase of the criminal process" because it concerned the evidence presented at trial. And all of the considerations that this Court found to militate in favor of absolute immunity in *Imbler* would militate in favor of immunity in such a case.

129 S. Ct. at 862 (internal citations omitted)(emphasis supplied). This Court emphasized:

> The only difference we can find between *Imbler* and our hypothetical case lies in the fact that, in our hypothetical case, a prosecutorial supervisor or colleague might himself be liable for damages *instead of* the trial prosecutor. But we cannot find that difference (in the pattern of liability among prosecutors within a single office) to be critical.

129 S. Ct. at 862 (emphasis in original). *Imbler* and *Van de Kamp* show that any result other than absolute immunity for all facets of the prosecution effort from Felony Review through trial essentially undermines the entire grant of absolute, prosecutorial immunity.

Thus, as this Court clarified in *Van de Kamp*, *Imbler* stands for the proposition that not only the trial prosecutor, but the other nonsupervisory line assistants in the office not involved in the prosecution would be entitled to immunity as well. As this Court explained, it was not enough simply to characterize prosecutor's

conduct as administrative in the case before it, because the claims:

> focus on a certain kind of administrative obligation – a kind that itself is directly connected with the conduct of a trial. Here, unlike with other claims related to administrative decisions, an individual prosecutor's error in plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like.

Van de Kamp, 129 S. Ct. at 862.

In sum, *Van de Kamp* teaches that the purpose of prosecutorial immunity is to protect the office's function in prosecuting criminal cases, rather than just an individual prosecutor. Shifting grants of immunity for different members of the prosecution team should not be used to defeat immunity, because:

> We do not see how such differences in the pattern of liability among a group of prosecutors in a single office could alleviate *Imbler's* basic fear, namely, that the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks. Moreover, this court has pointed out that "it is the interest in protecting the proper functioning of the office,

> rather than the interest in protecting its occupant, that is of primary importance." [Citation omitted.] Thus, we must assume that the prosecutors in our hypothetical suit would enjoy absolute immunity.

Ibid.

With nearly 900 attorneys, the CCSAO is the second largest county prosecutor's office in the nation, second only to Los Angeles County.[4] Given the size of the CCSAO and the number of felony cases arising in Cook County on an annual basis, the CCSAO created Felony Review for the purpose of reviewing cases upon referral or inquiry from law enforcement agencies to determine whether the CCSAO will approve initiation of felony charges in a particular case.

The duties of assistant state's attorneys assigned to Felony Review typically involve interviewing witnesses (including a suspect upon consent after having been read his or her *Miranda* rights), reviewing evidence gathered by the police in their investigation, deciding what information is necessary for trial, preparing a felony review card, and approving or declining to approve felony charges. *See Hampton v. City of Chicago*, 349 F. Supp. 2d 1075, 1081 (N.D. Ill. 2004) (observing that prosecutors assigned to Felony Review interview witnesses, decide what information was necessary for trial, prepare a felony review card,

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4. See website for the Cook County State's Attorney's Office at http://statesattorney.org/about_the_office.htm (visited July 15, 2009).

interview suspects, read suspects their *Miranda* rights and approve charges against suspects). *See also Anderson v. Simon*, 217 F.3d 472, 473 (7th Cir. 2000)(assistant state's attorney from Felony Review assigned to determine whether suspect to be charged with felony burglary).

Prosecutors assigned to Felony Review work in conjunction with other prosecutors within the CCSAO, including supervisors and the trial prosecutors, in initiating and presenting the State's case at trial. Under *Imbler*, assistant state's attorneys assigned to Felony Review have been found entitled to immunity for their conduct in reviewing evidence and approving charges in felony cases. *See, e.g., Hunt v. Jaglowski*, 926 F.2d 689 (7th Cir. 1991) (holding that a Felony Review prosecutor who took a suspect's statement, who was told by the suspect that the statement was coerced and who decided to approved felony charges performed a prosecutorial function and was, therefore, absolutely immune from suit); *see also Spiegel v. Rabinovitz*, 121 F.3d 251, 256 (7th Cir. 1997) (holding that a prosecutor who "simply evaluated the evidence assembled" including "review[ing] the police records, interview[ing] the parties involved and then pass[ing] on his assessment of the case to his superior" performed a prosecutorial function and was, therefore, absolutely immune from suit).

In one case, a litigant attempted to characterize the conduct of a prosecutor assigned to Felony Review as "investigative" where the prosecutor determined insufficient evidence existed to support criminal charges and declined to approve charges until certain further

investigative steps were taken by the police. *Anderson v. Simon*, 217 F.3d 472 (7th Cir. 2000). In *Anderson*, plaintiff's decedent committed suicide while being held in the police lockup pending charging, after his arrest for burglary. The prosecutor from Felony Review had refused to approve charges until after a lineup was held, leading police to detain the suspect overnight. The Seventh Circuit held that this was a prosecutorial decision, not investigative, and the prosecutor was entitled to absolute immunity from suit under Section 1983 for his decision not to approve charges, stating that "[l]ike the assistant state's attorney in *Spiegel*, [the defendant assistant state's attorney] reviewed and weighed the evidence, and he determined that additional evidence was necessary to support a felony burglary charge." *Anderson*, 217 F.3d at 476.

The role of Felony Review is a practical illustration of Justice Kennedy's observation in *Buckley*:

> Two actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions. It may be that a prosecutor and a police officer are examining the same evidence at the same time, but the prosecutor is examining the evidence to determine whether it will be persuasive at trial and of assistance to the trier of fact, while the police officer examines the evidence to decide whether it provides a basis for arresting a suspect. The conduct is the same, but the functions distinct.

509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part). Police typically call Felony Review

after they have investigated a crime and identified or arrested a suspect, against whom they seek approval of felony charges. For violent felonies, this involves going to the police station. Hence, assistant state's attorneys interview witnesses and suspects and review evidence at the police station, although they are doing so on behalf of the CCSAO for the purpose of determining whether a prosecution will be initiated and whether the evidence can sustain the State's burden of proof at trial. This is generally the first step in initiating a felony prosecution in Cook County.

Without immunity for performing prosecutorial functions such as calling a witness at trial, prosecutors would, in many cases, be reluctant to call witnesses who might change their testimony. That is why *Imbler* held that prosecutors are immune from suit based upon charges that they suborned perjury. Similarly, a prosecutor assigned to Felony Review would understandably be reluctant to take a statement from a witness or suspect if that prosecutor could later be sued based upon an allegation of coercion or fabrication of evidence. Prosecutors on felony review who perform the prosecutorial functions of interviewing witnesses, taking statements from such witnesses and evaluating evidence need the protection of absolute prosecutorial immunity just as much as trial prosecutors.

In his partial concurrence and dissent in *Buckley*, Justice Kennedy raised the concern that, with respect to actions preparatory to a prosecution, a narrow construction limiting absolute immunity to the actual initiation of charges and prosecution would convert the

substantial protection afforded prosecutors into little more than a pleading rule, explaining:

> Almost all decisions to initiate prosecution are preceded by substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence and preparing for its introduction, just as almost every action taken in the courtroom requires some measure of out-of-court preparation. Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.

Buckley, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part). This concern is paramount for a large prosecutor's office, such as the CCSAO, where the fact that a different prosecutor was involved in the approval of charges than in the trial provides another target for a plaintiff sorting among "patterns of liability" among prosecutors in the office. The Eighth Circuit's decision below takes this concern one step further by allowing a plaintiff who alleges that the introduction of allegedly fabricated evidence at trial injured him to reframe his claim to characterize the conduct of the prosecutor preparing the objectionable evidence as "investigatory" and recognizing an actionable claim at that juncture to avoid the application of immunity.

Felony Review was designed to screen and manage the flow of cases that are charged for felony prosecution. Assignment to Felony Review typically occurs early in a prosecutor's progression through the CCSAO. The threat of civil liability for the prosecutor's role in reviewing cases and approving felony charges on behalf of the CCSAO can be an extremely inhibiting factor in the exercise of the independent judgment, particularly in close cases. The prosecutors assigned to Felony Review often have to make quick initial judgments about the sufficiency of evidence and the credibility of witnesses when deciding whether to approve charges, particularly when a suspect is in custody. The rule from *McGhee* can only serve to chill the independent judgment of these prosecutors. Moreover, the availability of punitive damages in individual capacity Section 1983 actions further contributes to this chilling effect.

McGhee presents large prosecutor's offices with a difficult dilemma: not assigning prosecutors to criminal cases at their early stages or not approving charges in close cases out of fear of collateral civil litigation. As this Court has explained, immunity recognized in *Imbler* does not exist to help prosecutors in the easy case. Instead, "it exists because the easy cases bring difficult cases in their wake. And, as *Imbler* pointed out, the likely presence of too many difficult cases threatens, not prosecutors, but the public, for the reason that it threatens to undermine the necessary independence and integrity of the prosecutorial decision making process." *Van de Kamp*, 129 S. Ct. at 864.

Prosecutors on Felony Review perform the important function of speaking with witnesses, evaluating evidence and ensuring that charges are brought only in cases where the evidence warrants such charges. Consequently, a diminution of the prosecutor's role at the early stages of criminal cases only serves to harm the general public. In this regard, *McGhee* represents a substantial departure from the principles of absolute, prosecutorial immunity set forth in *Imbler* and *Van de Kamp* and should, therefore, be reversed.

CONCLUSION

Amicus respectfully requests that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed in a manner which protects prosecutorial immunity for prosecutors who are assigned to criminal matters early in the process, like prosecutors on Felony Review.

Respectfully submitted,

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Petitioners,

v.

CURTIS W. MCGHEE, JR. AND
TERRY J. HARRINGTON,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Assistant United States Attorneys and the National District Attorneys Association submit this *amici curiae* brief in support of petitioners Pottawattamie County, Iowa, Joseph Hrvol, and David Richter.

The National Association of Assistant United States Attorneys is the voice of Assistant United States Attorneys in the Department of Justice and Congress, helping to safeguard justice and promote the interests of AUSAs. It was founded in 1993 to protect, promote, foster and advance the mission of AUSAs and their responsibilities in promoting and preserving the Constitution of the United States, encouraging loyalty and dedication among AUSAs in support of the Department of Justice, and encouraging the just enforcement of laws of the United States. It is the "bar association" for the more than 5400 AUSAs throughout the country and the U.S. territories.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7000 members, including most of the nation's local

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[1] Letters reflecting the parties' consent to the filing of this brief are being lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The association's mission is "[t]o be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement. NDAA also files *amicus* briefs on issues relevant to its members and mission, including briefs in this Court in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), and *Davis v. Washington*, 547 U.S. 813 (2006).

SUMMARY OF ARGUMENT

The Court should reverse the holding of the Eighth Circuit, which creates the very real risk that prosecutors will face litigation and potential liability imposed by civil damages over the conduct of their official duties, thereby chilling prosecutorial efforts that are necessary to combat and deter crime. The increase in litigation will impose precisely the burdens on prosecutors – in terms of both time and money – that the doctrine of absolute immunity is intended to preclude.

Nor is the remedy sought by respondents in this case necessary to deter prosecutorial misconduct. To the contrary, prosecutors who engage in misconduct are already subject to discipline by a variety of institutions, including the prosecutors' offices themselves, state bar associations, and the judges before whom they appear. In the most extreme cases, prosecutors may face criminal sanctions for their misconduct.

Finally, civil remedies have not proven to be a practical remedy for plaintiffs against government officials. Although exposing prosecutors to civil liability for acts at trial may benefit the occasional defendant, the harm done to the judicial system far outweighs any benefits.

ARGUMENT

I. The court of appeals' ruling, if not reversed, will inflict entirely predictable negative consequences on prosecutorial efforts. First and foremost, it will lead to an increase in litigation against prosecutors. Under this Court's ruling in *Imbler v. Pachtman*, 424 U.S. 409 (1976), prosecutors are afforded absolute immunity at trial. The court of appeals' ruling would allow criminal defendants to circumvent this absolute immunity by shoehorning their allegations into claims focused on the allegedly improper *procurement* of evidence by prosecutors, notwithstanding that their convictions resulted only from the prosecutor's use of that evidence *at trial*. As one district court explained in granting a motion to dismiss in a Section 1983 case alleging that prosecutors had "solicit[ed] and knowingly us[ed] perjured testimony" against a criminal defendant, "[t]o allow such an allegation to defeat the prosecutor's immunity would vitiate the *Imbler* holding. Anyone against whom perjured testimony was used could then force the prosecutor to court in a civil damage action simply by reframing the claim to allege that the perjured testimony was solicited." *Tate v. Grose*, 412 F. Supp. 487, 488 (E.D. Pa. 1976). *See also Weinstein v. Mueller*, 563 F. Supp. 923, 927 (N.D. Cal. 1982) (in case brought against then-AUSA Robert Mueller,

who currently serves as director of the FBI, citing *Tate* and finding "no difference here between the knowing use of perjured testimony and the solicitation of it. If prosecutorial immunity did not cover the latter as well as the former, the protections of *Imbler* would disappear simply by the addition of another stock allegation.").[2]

The inevitable consequence of broader civil liability will be the chilling of the essential exercise of wholly constitutional efforts to prosecute criminal defendants. Prosecutorial discretion is a foundational principle of the American judicial system. A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest[] . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78 (1935). Prosecutors must balance demands from the courts, the police, and the people. In this role, the exercise of discretion is essential, as they are frequently required to make dozens of decisions – each of which involves the weighing of countless factors – related to the prosecution of their caseload, and each decision involves the weighing of countless

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[2] Similarly, whenever a court orders evidence suppressed (or, alternatively, whenever an appellate court holds that admitted evidence should have been suppressed), that holding could serve as the basis for a lawsuit alleging that a prosecutor was attempting to admit evidence that was subsequently found to be obtained in violation of the defendant's constitutional rights. Such lawsuits could disrupt a pending criminal case and, moreover, impose enormous litigation costs on small prosecutors' offices.

factors. "The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their . . . official functions." *Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927) (per curiam). The prospect of civil liability effectively gives the prosecutor a personal stake in every case, a conflict of interest directly at odds with his role as public servant. This conflict exists even for the most honest of prosecutors, because litigation can create significant burdens even in frivolous cases.[3]

As this Court has acknowledged, the prospect of liability for these decisions creates "the possibility that [the prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust."[4] *Imbler*, 424 U.S. at

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[3] And indeed, evidence suggests that the majority of claims of prosecutorial misconduct *are* frivolous. *See* U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005, at 4, 7 (noting that out of 827 complaints in 2005, only twenty-five cases of professional misconduct were found); *see also* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 677 (1986) (finding that constitutional tort plaintiffs succeed in only fourteen percent of cases)

[4] A study of the analogous context of illegal police searches and seizures provides a compelling illustration. When Chicago narcotics officers were asked about the potential effect of civil liability for Fourth Amendment violations, ninety-five percent responded that they would become afraid to conduct searches that they knew they should make. Myron W. Orfield, *The*

423; *see also id.* at 424-25 ("A prosecutor is duty bound to exercise his best judgment . . . . The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."). If this occurs, "[t]he work of the prosecutor would . . . be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." *Id.* at 424 (citing *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. App. 1935)). Indeed, the work of a prosecutor would be completely stymied if a defendant could file suit claiming a civil rights violation whenever prosecutors seek to convince reluctant witnesses to testify notwithstanding efforts by the defendant to intimidate them – efforts that are unfortunately all too common in cases involving, for example, gangs, organized crime, or domestic violence.

An increase in litigation will also impose significant burdens on prosecutors in terms of both time and money – precisely the burdens that absolute immunity is intended to remove. In *Imbler*, 424 U.S. at 425, this Court reasoned that absolute immunity was appropriate because, "if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." These burdens are particularly acute in constitutional tort cases, which typically spend more time on the docket and are more

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Exclusionary Rule and Deterrence, 54 U. Chi. L. Rev. 1016, 1053 (1987).

likely to generate discovery than other civil cases. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 694 (1986). Furthermore, because prosecutors must often continue to handle a full caseload even while litigation is pending against them, these burdens will extend not only to individual prosecutors, but also to the justice system as a whole.

Indeed, this Court has recognized that absolute immunity is particularly appropriate for prosecutors because "suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor," who "would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials" because he "frequently act[s] under serious constraints of time and even information" and thus "inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Imbler*, 424 U.S. at 425-26.

II. Contrary to respondent McGhee's assertion that "bad police and bad prosecutors are held accountable in civil rights cases like this one or not at all," McGhee BIO 20, the remedy sought by respondents (and upheld by the Eighth Circuit in this case) is not necessary "to deter objectionable prosecutorial conduct," because there are other "means more narrowly tailored" to do so. *United States v. Hasting*, 461 U.S. 499, 506 (1983). *Compare also, e.g.*, McGhee BIO 19 (positing that "[p]rosecutors would be free to fabricate evidence

during criminal investigations because they would know there was virtually no possibility of ever being punished for it").

a. First, as the United States has recently explained, "[p]rosecutorial offices . . . often have their own internal mechanisms to address prosecutorial misconduct and ensure that prosecutors, including supervisors, meet the highest standards of ethical misconduct." Br. *Amicus Curiae* of U.S., *Van de Kamp v. Goldstein* (No. 07-854) at 32. At the federal level, the Department of Justice's Office of Professional Responsibility ("OPR") has responsibility for investigating "allegations of professional misconduct made against Department of Justice ("DOJ") attorneys where the allegations relate to the exercise of the attorney's authority to investigate, litigate, or provide legal advice," including allegations similar to those at issue in this case. U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005, at 1 ("OPR 2005 Annual Report") (OPR investigates allegations that include violations of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and Federal Rule of Criminal Procedure 16, as well as allegations of improper coercion or intimidation of witnesses); *id.* at 14 (describing an investigation of a prosecutor's failure to disclose a witness's conflicting statements that ended in sanction and referral to state bar authorities); *see also Hasting*, 461 U.S. at 506 n.5 ("Here, for example, the court could have dealt with the offending a- gument by asking the Department of Justice to initiate a disciplinary proceeding against him . . . ."). OPR – which is made up of twenty-two permanent career attorneys and several detailees

from various U.S. Attorneys' offices – operates independently within the Department of Justice, reporting directly to the Attorney General. *See* U.S. Dep't of Justice, *Office of Professional Responsibility*, *available at* www.usdoj.gov/opr/ (visited July 12, 2009).

OPR's investigations of prosecutorial misconduct may arise from complaints from a variety of sources, including private attorneys and parties, judicial referrals, and self-reporting by Department employees. *See* OPR 2005 Annual Report 5. OPR itself also conducts regular searches of electronic databases to locate any judicial criticism of federal prosecutors. It reports the results of its investigations to the Office of the Deputy Attorney General and the relevant DOJ management officials, including "a recommended range of discipline" for attorneys who are found to have engaged in misconduct. DOJ officials are then responsible for imposing "any disciplinary action that may be appropriate," although they cannot depart from OPR's recommendations without advance notification to the Office of the Deputy Attorney General. *Id.* at 2. In the cases in which OPR found professional misconduct, disciplinary action that included suspensions and reprimands was initiated in nearly two-thirds of them. As a further deterrent, these disciplinary actions were disclosed to the general public.

b. At the federal, state, and local levels, prosecutors are also subject to discipline by state bar associations. As this Court explained in *Imbler*, 424 U.S. at 429, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of

constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."

When OPR concludes that federal prosecutors have engaged in misconduct – by finding either intentional misconduct or "that a subject attorney acted in reckless disregard of a professional obligation or standard," it automatically notifies "the bar counsel in each jurisdiction in which an attorney found to have committed professional misconduct is licensed," OPR 2005 Annual Report 3, of both the finding and any discipline imposed. The bar association (which, of course, could also learn of potential misconduct by federal prosecutors from independent sources, including the bar counsel's own review of judicial opinions) may conduct its own investigation of the misconduct, and may also decide to impose its own discipline. *See* 28 U.S.C. § 530B(a) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."); *see also United States v. Grass*, 239 F. Supp. 2d 535 (M.D. Pa. 2003) (applying Pennsylvania Rules of Model Conduct to an Assistant United States Attorney, under Section 530B(a)); *United States v. Acosta*, 111 F. Supp. 2d 1082 (E.D. Wis. 2000) (applying Wisconsin Supreme Court Rules to an Assistant United States Attorney, under Section 530B(a)).

State prosecutors are similarly subject to discipline by state bar associations for their misconduct. In Iowa, for example, petitioners as practicing attorneys were subject to several applicable Iowa Court Rules, including Rule 32.3.8(a) (prohibiting prosecutor from prosecuting a charge that he knows is not supported by probable cause) and Rule 32.3.8(d) (prohibiting a prosecutor from knowingly failing to disclose exculpatory evidence). There is no statute of limitations for the filing of an attorney disciplinary complaint, which may be filed by "any person, firm, or other entity," Iowa Ct. R. 34.1, with the Iowa Supreme Court Attorney Disciplinary Board – which may also initiate an investigation or disciplinary action on its own, Iowa Ct. R. 34.5. Possible sanctions could include a private admonition, public reprimand, or suspension or revocation of the prosecutor's law license. Iowa Ct. Rs. 34.11, 35.9, 36.16. *See, e.g.*, *Iowa S. Ct. Att'y Disciplinary Bd. v. Borth*, 728 N.W.2d 205 (Iowa 2007) (publicly reprimanding assistant county attorney with no prior ethical violations for misconduct that included violation of rule prohibiting prosecutors from undertaking criminal defense work and violating ethical rules in negotiating plea bargains); *Iowa S. Ct. Att'y Disciplinary Bd. v. Barry*, No. 08-1214, 2009 WL 415528, at *12 (Iowa Feb. 20, 2009) (law license of county attorney – who had already been removed from office – suspended indefinitely, with no possibility of reinstatement for one year; misconduct included making a series of illegal plea agreements that required defendants to donate money to sheriff's office, which then used money to "purchase weapons for the department, to

pay [attorney's] cell phone bills, and to purchase a vehicle for [his] use").[5]

The courts of last resort in virtually every state have enacted similar rules to those in Iowa, usually by adapting standards established by the American Bar Association ("ABA"). *See* Model Rules of Prof'l Conduct (2009). Like the Iowa Court Rules, the ABA Model Rules contain several provisions to which petitioners may be subject as a result of their alleged misconduct. *See id.* R. 3.8(d) (requiring prosecutors to disclose exculpatory evidence to the defense); *id.* R. 3.8(h) (requiring prosecutors to "remedy" a conviction if it becomes apparent that the defendant did not commit the crime). Federal courts have also incorporated the ABA standards into their local rules. *See, e.g.*, *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 624 (S.D.N.Y. 1990) (noting that an attorney may be subject to discipline for "conduct violative of the Codes of Professional Responsibility of the American Bar Association or the New York Bar Association").[6]

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[5] *See also* John Stevenson, *Nifong May Be Ouster No-Show*, Durham Herald-Sun, June 28, 2007, at A1 (prosecutor in Duke lacrosse case stripped of law license by North Carolina state bar); Dee J. Hall, *Clash of Lawyers Coming To A Head*, Wis. St. J., July 8, 2007, at A1 (prosecutor under investigation by state authorities for lying and withholding evidence from defense; could face public reprimand); Bill Moushey, *He's Free After 4 Hard Years*, Pittsburgh Post-Gazette, Dec. 2, 2006, at A1 (fired district attorney also reported to state disciplinary board for investigation).

[6] These court rules have been adopted by reference by the Department of Justice and may provide the basis for

c. Prosecutors may also face a variety of additional sanctions as a consequence of their misconduct. First and foremost, they may lose their jobs. This is true not only for line attorneys, but also for the chief prosecutor in a jurisdiction, who may be subject to removal from office under state law or – if elected – may be defeated at the polls. *See, e.g.*, Bill Moushey, *He's Free After 4 Hard Years,* Pittsburgh Post-Gazette, Dec. 2, 2006, at A1 (assistant district attorney fired for misconduct during cross-examination of key witness; charges against defendant dropped); *Iowa S. Ct. Att'y Disciplinary Bd. v. Barry*, 2009 WL 415528, at *1 (county attorney removed by county district court in light of finding that attorney had "breached his duties knowingly and with a purpose to do wrong"); John Stevenson, *Nifong May Be Ouster No-Show*, Durham Herald-Sun, June 28, 2007, at A1 (reporting on effort to seek removal of Duke lacrosse prosecutor under North Carolina law permitting chief judge in a jurisdiction to remove district attorneys for certain types of misconduct).

Second, prosecutors may be sanctioned by the judges before whom they appear. *See, e.g.*, *Hasting*, 461 U.S. at 506 ("The Court also could have publicly chastened the prosecutor by identifying him in his opinion."); *see also Kyles v. Whitley*, 514 U.S. 419

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disciplinary action by OPR. *See* 28 C.F.R. § 77.4 ("A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.").

(1995) (identifying the prosecutor responsible for a *Brady* violation); *United States v. Flores-Chapa*, 48 F.3d 156 (5th Cir. 1995) (identifying the prosecutor responsible for an improper closing argument). Indeed, in the recent trial of Senator Ted Stevens, the district court held several federal prosecutors in contempt for their failure to turn over documents relating to alleged prosecutorial misconduct. Del Quentin Wilber, *6 Prosecutors No Longer Part Of Legal Team in Stevens Case*, Wash. Post, Feb. 18, 2009, at A6.[7] The effect of these sanctions should not be underestimated. In issuing sanctions, judges may bring the alleged misconduct to the attention of the prosecutor's supervisors and the public at large. Because prosecutors appear regularly before the court, they have a significant incentive to respond to these sanctions and correct any potential misconduct. The trial process itself also functions as a significant check on prosecutorial misconduct, because the adversarial system ensures that a prosecutor's allegations and conduct are contested. Reversal on appeal acts as an additional sanction, and an effective one. *See* James S. Liebman et al., *A Broken System: Error Rates in Capital Cases* (2000) (finding that sixteen percent of all capital cases are reversed on appeal due to prosecutorial misconduct).

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[7] Those prosecutors were subsequently removed from the government's legal team addressing misconduct allegations, and OPR is apparently investigating the misconduct allegations and contempt findings. Mike Scarcella, *Sealed Court Records, Transcripts Released in Stevens Case*, The BLT: The Blog of Legal Times, Feb. 18, 2009.

Third, in truly egregious cases, prosecutors may themselves face criminal sanctions for their misconduct. *See* 18 U.S.C. § 242 ("Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both . . . ."). One recent example is the case of four Muslim men accused of being part of a "sleeper" terrorist cell in Detroit. When allegations of prosecutorial misconduct that included suppression of evidence later surfaced, the Department of Justice not only sought dismissal of all terrorism charges against the defendants, but it also brought criminal charges against the prosecutor himself for conspiring "to present false evidence at trial and to conceal inconsistent and potentially damaging evidence from the defendants." Eric Lichtblau, *Ex-Prosecutor In Terror Inquiry Is Indicted*, N.Y. Times, Mar. 30, 2006, at A18.

d. There is no evidence that the further prospect of civil liability is necessary to deter prosecutorial misconduct. To the contrary, evidence suggests that civil liability will not be an effective remedy for would-be plaintiffs. The most thorough study of constitutional tort claims found that "constitutional tort plaintiffs do significantly worse than non-civil

rights litigants in every measurable way." Eisenberg & Schwab, *supra*, at 677.[8]

There should be serious consequences for prosecutors whose misconduct deprives a criminal defendant of his or her constitutional rights. But a civil remedy will create the worst of both worlds: it will chill legitimate prosecutorial conduct while at the same time failing to provide a substantial remedy to those who have been wronged. A defendant who believes that he has been the subject of unlawful or unconstitutional actions by a prosecutor has complete and unfettered access to the existing disciplinary regimes applicable to state and local prosecutors. State officials, state bars, and judges all stand ready to ensure the proper functioning of the prosecutorial system. By contrast, the prospect that a prosecutor's interactions with a witness may later be second-guessed by a civil jury – often many years later, when recollections have failed and relevant evidence is no longer available – poses a direct threat to the orderly prosecutorial function.

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[8] Overall, plaintiffs prevailed in only fourteen percent of constitutional claims, compared to fifty-nine percent in all other civil claims (excluding default judgments). Eisenberg & Schwab, *supra*, at 677. Another study of 12,000 analogous lawsuits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (which recognized a cause of action under the Constitution for those subject to unreasonable searches and seizures), found that only thirty of these resulted in judgments for the plaintiffs, and that judgments had been paid by only four of the defendants. Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. Rev. 337, 344-45 (1988).

CONCLUSION

For the foregoing reasons, as well as those outlined by the petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA, *et al.*,
Petitioners,

v.

CURTIS W. MCGHEE, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether prosecutors can be liable for an allegedly wrongful prosecution and conviction based on alleged misconduct occurring prior to the time that charges are filed.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments throughout the United States.[1] Because state and local governments usually finance the operations of state and local prosecutors, and generally indemnify prosecutors for their legal costs so that prosecutors can go about their duties without inordinate fear of liability, state and local governments bear the financial burden of defending prosecutors who are sued for activities undertaken within the scope of their employment. The potential financial burden of liability for wrongful convictions is substantial. For example, one of the few section 1983 wrongful conviction cases to go to trial resulted in a verdict of $1 million per year in compensatory damages for fifteen years of imprisonment. *See Newsome v. McCabe*, 319 F.3d 301, 302-03 (7th Cir.), *cert. denied*, 539 U.S. 932 (2003). Moreover, to the extent that the threat of liability inhibits state and local prosecutors from the vigorous performance of their duties, that inhibition would undermine the efforts of state and local governments to undertake aggressive law enforcement measures. Because of their vital interest in preserving an effective doctrine of prosecutorial immunity from civil liability, *amici* submit this brief to assist the Court in its resolution of this case.

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[1] The parties have consented to the filing of this *amicus* brief and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

On the morning of July 22, 1977, the body of John Schweer, a security guard and retired captain of the Police Department of Council Bluffs, Iowa, was found on the railroad tracks near O'Neill Datsun, one of three automobile dealerships that employed him to provide nighttime security. Pet. App. 24a.[2] Schweer had been killed by a 12-gauge shotgun blast in the chest. *Id.* Detectives Daniel Larsen and Lyle Brown, along with petitioners David Richter, the County Attorney for Pottawattamie County, and Joseph Hvrol, an Assistant County Attorney, undertook an investigation. Pet. App. 25a.

Several days before he died, Schweer had written a note indicating that he had chased an individual that he had seen trying to get into a vehicle at McIntyre Oldsmobile. Pet. App. 25a. He had also told a Council Bluffs police officer that he had seen a man, accompanied by a dog, carrying what appeared to be a rifle or car jack near O'Neill Datsun. *Id.* Footprints and dog prints had been found at the scene of the murder, and matching prints were found to the west of that location. Pet. App. 25a-26a.

James Burke, who worked at a Northwestern Bell location west of the murder scene, told Detective Brown that he had seen a man with a shotgun and a dog running on the night of July 19, and had later encountered Schweer, who had asked Burke if he had seen a man running in the area. Pet. App. 26a.

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[2] Because this is an interlocutory appeal denying petitioners immunity from suit, we take as true all facts that the district court deemed sufficiently supported for purpose of its ruling on the motion for summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996).

This account brought to Detective Larsen's mind Charles Gates, an area resident known to carry a shotgun while walking his dog. *Id.* David Waide, who worked near the crime scene, subsequently identified a photo of Gates as a man that Waide had last seen walking his dogs in the area on July 19, and two other area residents stated that they had seen a man matching Gates' description walking dogs in the area as recently as July 22. Pet App. 27a. Detective Larsen also learned that Gates had been a suspect in a 1963 homicide of a co-worker. *Id.* Gates agreed to take a polygraph examination, and the examiner believed that Gates had not been truthful when he had denied owning a shotgun or shooting Schweer. *Id.*

On September 19, 1977, police in Lincoln, Nebraska, stopped a stolen Cadillac containing three African-American teenagers; the driver was Kevin Mack, a/k/a Kevin Hughes, and passengers were Roderick Jones and Candice Pride. Pet App. 28a-29a. Hughes had a long criminal record, but denied knowing that the Cadillac Deville had been stolen. Pet. App. 29a. Hughes told police that three other individuals—Anthony Houston and respondents Terry Harrington and Curtis McGhee—had stolen a number of vehicles and had given him permission to drive the Cadillac. Pet. App. 60a. The next day, Hughes wrote a statement indicating that one of the car thieves had told him that he had stolen the car in Council Bluffs and "had killed this honkey." Pet. App. 61a.

After being told by the Nebraska police that Hughes might have information about Schweer's murder, Detectives Larsen and Brown went to Lincoln to interview him. Pet. App. 29a. The detectives

told Hughes that they knew he was involved in a car theft ring and that his confederates had murdered Schweer, and added that Hughes would not be charged and might even receive assistance on other pending charges and the $5,000 reward that had been offered if he could assist in the prosecution and conviction of Schweer's killers. *Id.*

Hughes initially told the detectives that an individual named Steven Frazier had told him that he had killed a security guard in the course of stealing a Lincoln Continental from McIntyre Oldsmobile, but the detectives rejected that account because no Lincoln had been stolen from McIntyre. Pet. App. 30a, 61-63a. Hughes later said that an individual named Arnold Kelly was involved in the Schweer killing, but the police determined that Kelly had been in Kansas City at the time. Pet. App. 30a, 63a-64a. Hughes also originally claimed that he was not present when Schweer was murdered, but after a polygraph examination produced indications of deception, Hughes admitted that this was a lie. Pet. App. 30a, 64a. In a September 30 statement, Hughes admitted that he was with the others at McIntyre Olds when Schweer was shot. Pet. App. 64a. Hughes was then brought to Council Bluffs for questioning. Pet. App. 30a.

A process then began by which the police and prosecutors began to work with Hughes in order to produce an account that was consistent with the evidence. Pet. App. 30a. For example, Hughes originally claimed that Harrington, McGhee, and Houston were looking for cars to steal on the night of the murder, and that Hughes stayed in their vehicle while the others went to steal a Toronado from McIntyre Oldsmobile, but Hughes later dropped Houston from the account after being told that Houston was

in jail at the time. Pet. App. 30a-31a, 65a. Hughes also originally claimed that Schweer was killed with a pistol, and later a 20-gauge shotgun, and only after he was told that a 12-gauge shell had been found at the scene did he say that the murder weapon had been a 12-gauge shotgun. Pet. App. 31a, 66a. Hughes also changed his account of where the murder took place after learning where Schweer's body had been found. Pet. App. 31a, 65a. Hughes originally stated that Harrington and McGhee had picked him up at approximately 11 PM, but after police learned that Harrington's football coach had seen him elsewhere around that time, Hughes stated that he had not been picked up until midnight. Pet. App. 32a-33.

In a taped statement, Jones stated that he was with Hughes and an individual named Clyde Jacobs when Harrington and McGhee picked up Hughes at about 11:30 PM on the night of the murder. Pet. App. 33a. He made that statement only after Detective Brown had told him that he should admit that he saw McGhee, Harrington, and Hughes together or risk being charged. *Id.* At McGhee's trial, Jones testified that he saw respondents pick Hughes up at 11 or midnight sometime in mid-July, and at Harrington's trial, Jones testified that this occurred on July 21 at midnight or 12:30 AM. Pet. App. 33a-34a. Jacobs told investigators that he saw Harrington and another individual pick up Hughes, and at McGhee's trial he testified that this occurred after midnight, while at Harrington's trial he testified that it occurred after 11. Pet. App. 34a.

Pride had been dating Hughes, and was told that he would be charged with murder if she did not corroborate his account. Pet. App. 34a. On October 12,

Pride signed a statement indicating that in late July, she saw Harrington and McGhee pick up Hughes at about 10:45 PM, yet she recanted in an April 1978 statement to McGhee's lawyer, although she returned to the earlier account when she testified at McGhee and Harrington's trials. Pet. App. 34a.

Hughes eventually claimed that Harrington and McGhee dropped him off after the murder at about 1:30 AM at the house of his girlfriend, Linda Lee. Pet. App. 34a-35a. In October 1977, Lee signed a statement indicating that Hughes came to her house after midnight one evening in late July, and that she saw Harrington and another individual in Harrington's car. Pet. App. 35a.[3] Two workers at a business near the murder scene told police that on the night of the shooting, they heard a loud noise between 3 and 3:30 AM, and the medical examiner placed the time of death at around 4:00 AM. *Id.*

On November 16 and 17, 1977, respectively, preliminary informations, signed by Detective Brown and approved by petitioners, were filed charging respondents with murder, and both were arrested. Pet. App. 35a. On February 17, 1978, a true information was filed charging respondents with murder. Pet. App. 36a. Subsequently, the investigators sought out inmates who were jailed with McGhee to testify against him. Pet. App. 36a-37a. Tyrone Pierce was offered reduced charges, and after being placed in a cell near McGhee, he stated that McGhee admitted killing Schweer. Pet. App. 37a. In exchange for a promise that he would not go to a reformatory, Larry

[3] At McGhee's trial, Lee was unable to say when in July Hughes came over, or whether it was before or after 1 AM, and at Harrington's trial, she testified that Hughes came over after midnight twice on the same evening in July. *Id.*

Plater claimed that McGhee told him he had been present when Harrington killed a police officer. *Id.* Earl Hartwell told investigators that McGhee had told him that Harrington and another individual had shot a "sheriff" twice, although at trial he denied that he had said anything about another individual, and Hartwell's sentence was later reduced. *Id.*

On June 13, 1978, McGhee was convicted of first degree murder and sentenced to life in prison. Pet. App. 37a. Harrington was convicted and sentenced to life on August 4. *Id.* Petitioners never disclosed to the defense any of the information or reports identifying Charles Gates as a suspect. Pet. App. 5a, 36a; *see also id.* at 26a-27a.

In 1999, Anne Danaher, who worked at the prison where Harrington was incarcerated and who had gotten to know Harrington and his family, requested and received the Council Bluffs police file on Schweer's murder, and learned of the withheld reports involving Gates. Pet. App. 38a-39a. Harrington filed a petition for post-conviction relief based on the reports, which the trial court denied, but the Iowa Supreme Court reversed, and ordered Harrington's conviction vacated on the ground that the prosecution had breached its duty to disclose material exculpatory information to the defense. *See Harrington v. State*, 659 N.W.2d 509 (Iowa 2003).

McGhee then filed his own petition based on the Iowa Supreme Court's decision in Harrington's case. Pet. App. 39a. In the interim, Hughes, Jacobs, Jones, Pride and Lee had all recanted their prior testimony. *Id.* Negotiations ensued between the current County Attorney and McGhee's counsel, and McGhee eventually agreed to plead no-contest to second degree murder, with an agreed sentence of 25

years that would permit his immediate release. Pet. App. 39a-43a, 47a. The County Attorney decided to drop charges against Harrington. Pet. App. 44a-47.

Following the end of criminal proceedings, Harrington and McGhee brought suit against former County Attorney Richter, Assistant County Attorney Hrvol, Detectives Brown and Larsen and others alleging, among other things, a deprivation of their constitutional rights redressable under 42 U.S.C. § 1983. Pet. App. 22a. On the petitioners' motion for summary judgment, the district court ruled that they were not entitled to absolute prosecutorial immunity from suit for their conduct prior to filing of the true information because they "were acting in an investigatory capacity rather than in an advocatory capacity." Pet. App. 80a. The district court further ruled that petitioners were not entitled to qualified immunity on respondents' claims that they "sought [respondents'] arrest . . . without probable cause," and that they "fabricat[ed] evidence and coerce[ed] witness testimony." Pet. App. 100a, 113a.

In an interlocutory appeal taken by petitioners from the district court's denial of immunity, the court of appeals affirmed. It agreed with the district court that the evidence, taken most favorably to respondents, established that they were arrested without probable cause, and the court added that "before the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity." Pet. App. 11a. The court also concluded that "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing

and fabricating evidence before filing formal charges . . . ." Pet. App. 19a.[4]

SUMMARY OF ARGUMENT

Compelling policy considerations support the rule that prosecutors are entitled to absolute immunity for their actions as advocates for the State. After all, prosecutors are expected to concern themselves with their professional obligations, not potential civil liability. Applying that rule of immunity here, the judgment of the court of appeals should be reversed.

Prior to filing charges, petitioners are alleged to have pressured witnesses and fabricated evidence. These allegations describe unprofessional conduct, but not a constitutional violation for which petitioners can be held liable. The Fourth Amendment forbids unreasonable search and seizure, such as arrest without probable cause, but that alleged violation occurred because petitioners filed charging documents and sought arrest warrants—all immunized acts. Similarly, the Due Process Clause forbids a wide variety of abusive governmental conduct, but only in connection with a deprivation of life, liberty, or property. Petitioners' handling of the Schweer murder investigation did not deprive respondents of life, liberty, or property—that deprivation occurred only when petitioners elected to bring charges and later failed to disclose exculpatory evidence—again, immunized acts.

Accordingly, petitioners' conduct prior to bringing charges did not amount to an actionable constitu-

[4] The court of appeals reversed the district court's refusal to grant the defendants immunity on respondents' state-law claims, finding them barred by sovereign immunity. Pet. App. 12a-17a.

tional tort. Instead, critical elements of both constitutional torts alleged here were petitioners' immunized charging and disclosure decisions.

Even if petitioners' pre-charging conduct were actionable, it is protected by prosecutorial immunity. Although the lower courts, relying on this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), held that prosecutorial conduct in the investigative stage is not entitled to absolute immunity, this Court's more recent decisions refuse to afford talismanic significance to the moment at which charges are filed—any prosecutorial action which is directed toward the manner in which a criminal case will be litigated is immunized. All the conduct alleged here involved efforts by prosecutors to build a case that would stand up in court, and is for that reason entitled to immunity.

ARGUMENT

The court of appeals held that prosecutors can be liable for constitutionally wrongful prosecutions and convictions based on their conduct prior to the filing of charges. None of petitioners' per-charging conduct, however, violated the Constitution. Moreover, all of the alleged pre-charging conduct had as its object the filing of charges and the presentation of evidence at trial, and for that reason is shielded by prosecutorial immunity.

In the discussion that follows, we consider first the rationale for prosecutorial immunity, and then explain why that immunity bars respondents' § 1983 action against petitioners.

I. THE DOCTRINE OF PROSECUTORIAL LIABILITY REFLECTS THE INABILITY OF PROSECUTORIAL LIABILITY TO PROMOTE THE OBJECTIVES OF TORT LAW.

It is settled that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (footnote omitted). Absolute immunity is essential because "fear of potential liability would undermine a prosecutor's performance of his duties by forcing him to consider his own potential liability when making prosecutorial decisions and by diverting his 'energy and attention . . . from the pressing duty of enforcing the criminal law.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 270 n.4 (1993) (quoting *Imbler*, 424 U.S. at 424-25 (ellipsis in original)).

Of course, the chill and distraction created by potential damages liability is not the complete explanation for prosecutorial immunity. For one thing, prosecutors rarely face a realistic threat of personal liability for actions within the scope of their employment. As Justice Breyer has observed, most public officials are indemnified for their legal costs and liabilities. *See Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (dissenting opinion). By statute, policy, or contract, indemnification is common in public employment, although it is often unavailable for intentional or other serious misconduct. *See, e.g.*, Lawrence Rosenthal, *A Theory of Damages against the Government: Torts, Constitutional Torts, and*

Takings, 9 U. Pa. J. Const. L. 797, 812, 819-20 (2007).[5]

For another, as the Court has observed, damages liability is a more powerful means of deterring misconduct in the private sector because public employers operate within a system of political accountability rather than as profit-maximizers with an economic incentive to make cost-justified investments in liability reduction. *See Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997). At best, public-sector damages liability can be expected to create a modest political incentive to take liability-avoiding precautions because damages awards force public employers to divert scarce public resources from what they are likely to regard as politically optimal uses. *See* Rosenthal, *supra*, at 831-43.

Thus, the threat of distraction and deterrence is an incomplete explanation for absolute prosecutorial immunity. In reality, the underlying rationale for immunity becomes apparent by comparing prosecutors to others engaged in law enforcement. The liability faced by police officers when enforcing the law could chill officers in the vigorous performance of their duties and distract them from their law-enforcement mission, yet the Court has declined to afford them absolute immunity, even when executing judicial process such as a warrant, on the ground that "the officer applying for a warrant . . . is further removed from the judicial phase of criminal proceed-

[5] This should be unsurprising; labor economics teaches that employers must offer sufficient compensation to account for the risk of liability that employees face and are likely to choose indemnification as the most efficient means of doing so. *See, e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 95 Yale L.J. 1231, 1239-43 (1984).

ings than the act of a prosecutor in seeking an indictment." *Malley v. Briggs*, 475 U.S. 335, 342-43 (1986). Absolute immunity, the Court has explained, is afforded only "to functions 'intimately associated with the *judicial* phase of the criminal process,'" *id.* at 342 (quoting *Imbler*, 424 U.S. at 430) (emphasis in original)). Qualified immunity, in contrast, is thought to provide officials performing investigative tasks with sufficient protections from liability. *See id.* at 343-44.

It is accordingly the prosecutor's intimate involvement with the judicial process that explains the rule of absolute immunity. Prosecutors are expected to concern themselves with their professional obligations to seek justice in the criminal process, not their potential liability to an investigative target. *See, e.g.*, ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Prosecution Function Standards 3-3.4, 3-3.9 & 3-3.11 (3d ed. 1993) (hereinafter "ABA Standards"). In fact, prosecutors who bring unwarranted charges or who fail to disclose exculpatory evidence risk having a prosecution founder, or a conviction set aside, with ensuing political and professional embarrassment. In extreme cases, prosecutors even face criminal or professional sanctions. *See Imbler*, 424 U.S. at 428-29. The additional deterrent effect of a civil damages remedy, which would be available only after a prosecution has resulted in an outcome favorable to the accused, and which would produce a judgment for which a prosecutor would likely be indemnified, is therefore vanishingly small.[6]

[6] It is settled that an accused cannot bring a civil action under section 1983 seeking damages for a wrongful prosecution or conviction until the prosecution has been terminated in a man-

Public-sector liability does create some budgetary—and therefore political—incentive to engage in risk management, but most prosecutors stay in office a relatively short time and therefore are more likely to be more concerned with the effect that important convictions may have on their own careers than with the long-term budgetary implications of aggressive prosecutorial tactics. *See, e.g.*, Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. Ann. Surv. Am. L. 45, 59-67 (2005); Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. Tex. L. Rev. 801, 825-30 (2006).

Equally problematic, the political incentive for elected officials to train their subordinates to avoid liability-creating behavior is likely to function poorly in the prosecutorial context. In all but three states and the District of Columbia, prosecutors hold office as independent elected officials. *See* Steven W. Perry, U.S. Dep't of Justice, *Prosecutors in State Courts, 2005* 11 (2006). The political independence of prosecutors is understandable; it is widely agreed that the administration of justice should be governed by professional norms and not subject to political interference. Yet independent prosecutors who do not levy taxes or appropriate revenues lack the direct political accountability for tax and spending policy experienced by legislators. For that reason, prosecutors and their staffs are likely to be less sensitive to the budgetary implications of prosecutorial actions that may generate exposure to liability.

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ner favorable to the accused. *See Heck v. Humphrey*, 512 U.S. 477, 484-90 (1994).

Moreover, the harms created by a regime of even limited prosecutorial liability would be great. To the extent that prosecutors faced a credible threat of personal liability, the likelihood of overdeterrence would be unacceptable. Prosecution witnesses, for example, recant their testimony with frequency, sometimes for good reason, but sometimes, as even advocates of the wrongfully convicted acknowledge, as a result of coercion or their relationships with defendants or their supporters. *See, e.g.*, Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves another Look*, 28 B.C. Third World L.J. 75, 85-86 (2008). If prosecutors faced a threat of liability every time a witness recanted and blamed his prior testimony on undue prosecutorial pressure, prosecutors could be paralyzed. A rule like the one adopted below, granting immunity limited to post-charging conduct, would have the perverse result of discouraging prosecutors from working with potential witnesses to make fully informed charging decisions, thereby crippling prosecutors in their role as advocates for the State. Conversely, taking the perhaps more realistic view that prosecutors are likely to be indemnified—and that civil suits are most likely in cases where indemnification is available to ensure that assets will be available to satisfy a judgment—the threat of civil liability is unlikely to affect prosecutorial behavior.

This Court "'ha[s] repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability' . . . and ha[s] interpreted the statute in light of the 'background of tort liability.'" *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (internal citations omitted). For that reason, section 1983 should be construed in a manner that

affords compensation for and deterrence of unconstitutional conduct in the manner of traditional tort law. *See, e.g., Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-07 (1986); *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980); *Robertson v. Wegmann*, 436 U.S. 584, 589-90 (1978). Yet, as we explain above, civil liability is likely to lead to either massive over- or underdeterrence of prosecutors. Accordingly, when prosecutors act as advocates, the threat of civil liability is unlikely to properly serve the deterrent function of the law of torts.

In contrast, the safeguards built into the criminal justice system, coupled with the ordinary processes of political accountability, are far more likely to deter such misconduct that the possibility of a damages remedy. The efficacy of political accountability should be apparent; there is, after all, no let's-convict-the-innocent lobby. Not only will overreaching prosecutors pay a political price; but such overreaching can lead to systemic reform as well. For example, since the wave of DNA exonerations of recent years, there has been a wave of reform legislation, with 46 states and the Federal Government enacting legislation granting accused or convicted individuals access to DNA evidence. *See Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2316-17, 2322 (2009).

While prosecutorial liability would provide compensation to the exonerated, but a regime of compensation without an effective and appropriate measure of deterrence would amount to a system of wrongful conviction insurance, not the type of tort liability for which section 1983 provides. Any wrongful conviction is a grievous wrong; from the standpoint of compensation, there is no less justification for a payment

to one who was convicted as a result of a constitutionally defective proceeding as to one who was convicted as the result of an innocent mistake. As we explain above, section 1983 creates a species of tort liability, not a system of social insurance. Prosecutorial liability, however, offers only the latter.

There may be sound policy arguments for providing some form of wrongful conviction insurance; indeed, the Federal Government and 22 States have statutes that require that compensation be paid to the exonerated. Many of these statutes, however, contain important limitations on who can make claims and the amount of compensation available, reflecting legislative efforts to balance the State's interest in compensating the exonerated against competing budgetary priorities. *See* Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. Rev. 227, 233-35, 250-51 (2008). Yet, the policy decision whether to devote scarce public resources to the wrongfully convicted, instead of allocating them other urgent public responsibilities, is surely one for the legislature. The weakness of tort litigation as a means of providing social insurance at taxpayer expense, after all, is that judges and juries are in no position to weigh the importance of such insurance against other competing budgetary priorities.

For these reasons, the doctrine of absolute prosecutorial immunity has a compelling justification. When civil liability has little chance of providing anything like the kind of deterrence associated with traditional tort law, the rationale for diverting scarce public resources from the provision of governmental service to the public to the payment of judgments and the defense of litigation is wanting. Indeed, pro-

tecting the public fisc against undue liability burdens is one of the objectives of section 1983 that this Court has identified. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-95 (1978).

II. PETITIONERS ARE NOT LIABLE FOR THEIR PRE-CHARGING CONDUCT.

The lower courts acknowledged that petitioners are entitled to absolute immunity for everything they did upon filing charges against respondents, but believed that petitioners could be liable under section 1983 for their pre-charging conduct. Section 1983, however, affords a remedy only for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983. Even if the lower courts were correct that petitioners are entitled to only qualified immunity for their pre-charging conduct, this conduct is not actionable under section 1983 because it did not deprive respondents of any constitutional right, privilege, or immunity. Moreover, even if the pre-charging conduct was otherwise actionable, it was shielded by prosecutorial immunity.

A. Petitioners' Pre-Charging Conduct Was Not a Constitutional Tort.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It follows that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defen-

dant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). *Accord, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

Respondents have pressed two constitutional claims on which the lower courts believed that petitioners could be held liable—violations of the Fourth Amendment's prohibition on unreasonable search and seizure and the Fourteenth Amendment's Due Process Clause. We consider each in turn.

1. *The Fourth Amendment Claim.*

The lower courts concluded that the evidence, viewed in the light most favorable to respondents, established that they were arrested without probable cause in violation of the Fourth Amendment. Petitioners' pre-charging conduct, however, is not actionable under the Fourth Amendment.[7]

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. There is no claim, however, that respondents were searched nor seized in connection with the Schweer investigation until they were charged. Prior to their

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[7] Claims relating to respondents' arrest are properly analyzed under the Fourth Amendment and not the Due Process Clause. Because deprivations of liberty associated with the filing of criminal charges are addressed by the Fourth Amendment, they are not cognizable as due process violations unless the plaintiff can identify some particular interest at stake that is not protected by the prohibition on unreasonable search and seizure. *See Albright v. Oliver*, 510 U.S. 266, 271-74 (1994) (plurality opinion); *id.* at 289-91 (Souter, J., concurring in the judgment). *Cf. Graham v. Connor*, 490 U.S. 386, 392-95 (1989) (claims of excessive force during arrest or investigative stops should be judged by the Fourth Amendment and not due process).

decision to approve the charges contained in the preliminary informations, petitioners had undertaken no search or seizure of respondents that could operate as the predicate for Fourth Amendment liability. The mere fact that an individual is under investigation by the authorities is not sufficient to render the Fourth Amendment applicable to investigative conduct. *Cf. Michigan v. Chesternut*, 486 U.S. 567, 574-76 (1988) (Fourth Amendment not implicated by police pursuit of suspect); *United States v. Knotts*, 460 U.S. 276, 282-85 (1983) (Fourth Amendment not implicated by continuous surveillance of suspect). Yet prior to the time that the preliminary informations were filed, all that petitioners had done was to place respondents under investigation.

Petitioners' decision to approve the charges contained in the preliminary informations surely led to respondents' arrests, but it was protected by prosecutorial immunity. As we explain above, it is settled that a prosecutor's decision to bring charges is shielded by immunity. The preliminary informations in this case were indistinguishable from the filing of an information and motion for an arrest warrant that the Court held entitled a prosecutor to absolute immunity on a Fourth Amendment claim in *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997).[8] Like the Washington statutes at issue in *Kalina*, Iowa law provided for the filing of a preliminary information

[8] In *Kalina*, while granting the prosecutor immunity for filing an information and motion for an arrest warrant, the Court denied immunity for executing a certification under penalty of perjury because by swearing to the truth of the allegations of probable cause to arrest, the prosecutor was acting as a witness rather than an advocate. *See* 522 U.S. at 129-31. In this case, however, Detective Brown swore to the truth of the allegations of probable cause.

in order to obtain an arrest warrant, *see* Iowa Code Ann. §§ 754.1-.7 (1977); and a judge's decision to issue a warrant based on a preliminary information is considered a judicial act under Iowa law even when the preliminary information is unsupported by probable cause or otherwise improper. *See Huendling v. Jenson*, 168 N.W.2d 745, 749-50 (Iowa 1969).

Thus, petitioners initiated the judicial process by approving the preliminary informations. The fact that respondents' arrests may have been unsupported by probable cause is no basis to deny petitioners' immunity for their decision to invoke judicial process; the claim in *Kalina* was no different. *See* 522 U.S. at 120-22, 129. The doctrine of prosecutorial immunity is, after all, based on the common-law rule "providing prosecutors with absolute immunity from tort actions based on claims that the decision to prosecute was malicious and unsupported by probable cause . . . ." *Id.* at 124 (footnote omitted).[9]

As in *Kalina*, petitioners likely decided to seek respondents' arrest prior to filing charges, but that is also no basis to deny them immunity. The decision to file charges—even preliminary charges that must eventually be supplemented by a formal charging document—is a legal judgment made by the State's advocate, and falls within the heart of immunity. If a plaintiff could overcome immunity by focusing on the pre-charging decision to bring charges, the immunity for charging decisions would become illusory;

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[9] The development of this rule came in the decades following the enactment of section 1983, but the Court found this common law development instructive since the office of public prosecutor in its modern form was previously largely unknown. *See Kalina*, 522 U.S. at 124 n.11; *Burns v. Reed*, 500 U.S. 478, 484-86 (1991).

every Fourth Amendment claim attacking a charge allegedly unsupported by probable cause could be reframed as an attack on an earlier decision to proceed on that charge.

In *Imbler*, the Court rejected a similar argument; it concluded that the prosecutor's immunity for the presentation of evidence necessarily reached an alleged failure to disclose exculpatory evidence to the defense because

> [a] claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence . . . . Denying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony.

424 U.S. at 431 n.34. *Cf. Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.").[10]

In approving the preliminary informations, petitioners were not performing functions indistinguish-

[10] In any event, respondents cannot recover damages for their convictions on the Fourth Amendment claim. There is no reason to believe that an arrest unsupported by probable cause will produce a wrongful conviction as long as the accused is afforded a fair trial, and hence damages for the conviction are unavailable on a Fourth Amendment claim under the rules of proximate causation applied in section 1983 litigation. *See* John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 Va. L. Rev. 1461, 1470-77 (1989).

able from those of investigating officers; they were making a legal judgment about the commencement of legal proceedings. For that reason, they were entitled to prosecutorial immunity.

2. *The Due Process Claim.*

The lower courts concluded that petitioners' precharging efforts to shape witnesses' testimony while suppressing the Gates evidence was actionable under the Due Process Clause. Yet, petitioners' precharging conduct, even if imprudent or unethical, did not violate the Constitution.

Taking the evidence most favorably to respondents, petitioners placed a good deal of pressure on Hughes and other witnesses to cooperate with the investigation, and to provide what petitioners regarded as a credible account. This is not unusual; potential witnesses are frequently reluctant to cooperate with investigations of violent crimes, and prosecutors often find it necessary to offer significant carrots or sticks to obtain cooperation, especially from accomplice witnesses who face exposure for their own role in an offense. Petitioners may have gone too far in their investigation of Schweer's murder, but that alone does not make out a due process violation.

The fact that an investigation utilizes tactics that create a threat to the right to fair trial is not enough to violate due process; the critical constitutional question is whether the ensuing trial is fair. For example, the Court has held that even when investigators use an unnecessarily suggestive procedure to induce an eyewitness to identify a suspect, due process is not offended as long as the record as a whole indicates that the identification is accompanied by adequate indicia of reliability. *See Manson v.*

Brathwaite, 432 U.S. 98, 109-14 (1977). As the Court explained: "Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Id.* at 113 n.13.[11]

The same is true of petitioners' pre-charging handling of the witnesses. The Due Process Clause addresses "depriv[ations] of life, liberty, or property." U.S. Const. amend. XIV, § 1. Prior to charging, however, petitioners had not deprived respondents of such a constitutionally protected interest. Their pre-charging handling of the witnesses may have been imprudent or even unethical, but "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson*, 467 U.S. 504, 511 (1984).

It is settled that the Constitution requires no "judicial oversight or review of the decision to prosecute." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). *Accord, e.g., Albright v. Oliver*, 510 U.S. 266, 282-83 (1994) (Kennedy, J., concurring in the judgment); *Costello v. United States*, 350 U.S. 359, 362-64 (1956). A fortiori, the same is true of a prosecutor's investigative decisions. As long as respondents were afforded a fair trial at which they could to alert the jury to the prosecutors' efforts to tailor witness tes-

[11] For this reason, a number of circuits have held that damages liability is inappropriate for the use of unduly suggestive identification techniques absent a showing that they undermined the fairness of an ensuing trial. *See, e.g., Alexander v. City of South Bend*, 433 F.3d 550, 555-56 (7th Cir. 2006); *Pace v. City of Des Moines*, 201 F.3d 1050, 1055 (8th Cir. 2000); *Hutsell v. Sayre*, 5 F.3d 996, 1004-05 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994).

timony, they received due process. *Cf. Buckley*, 509 U.S. at 281 (Scalia, J., concurring) ("[P]etitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution."). And, as it happens, there is no claim that any of the evidence relating to petitioners' handling of the witnesses was kept from the defense during respondents' criminal prosecutions. The jury may have erred in crediting that testimony despite ample impeachment, but respondents were afforded due process.

As for petitioners' failure to disclose the exculpatory evidence relating to Gates, this omission was plainly unconstitutional—and resulted in vacatur of respondents' convictions—but this constitutional violation did not occur prior to charging. It occurred only after charges had been filed, and was accordingly immunized.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court concluded that the right to a fair trial secured by the Due Process Clause imposed an obligation on prosecutors to disclose exculpatory evidence to the defense. Even so, the suppression of exculpatory information deprives an accused of due process only when that there is a reasonable probability that the suppressed information affected the outcome of the trial. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). Accordingly, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed

evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.[12]

Thus, petitioners' pre-charging conduct did not run afoul of *Brady*; on the contrary, we know of no authority suggesting that due process somehow obligates prosecutors to halt an investigation in the face of exculpatory evidence. *Cf. United States v. Williams*, 504 U.S. 36, 51-55 (1992) (prosecutors are under no constitutional obligation to present exculpatory information to a grand jury). After all, "[t]he Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). There was surely no obligation on petitioners to put a stop to the efforts to determine if Hughes could supply reliable information about the Schweer murder so clear and well-established as of 1977 that it could deprive petitioners of qualified immunity merely because there was also evidence that pointed to Gates.

It was only when the Gates evidence was not disclosed in time for the defense to use it at respondents' trials, and when that nondisclosure had a material effect on the verdicts, that a due process violation occurred. That violation, however, was immu-

[12] A number of courts of appeals have held that the suppression of exculpatory evidence is not actionable when it has not produced a conviction. *See, e.g., Becker v. Kroll*, 494 F.3d 904, 923-24 (10th Cir. 2007); *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999); *Rogala v. District of Columbia*, 161 F.3d 44, 55-56 (D.C. Cir. 1998) (per curiam); *Flores v. Satz*, 137 F.3d 1275, 1277-78 (11th Cir. 1998); *Taylor v. Waters*, 81 F.3d 429, 435-36 (4th Cir. 1996); *McCune v. City of Grand Rapids*, 842 F.2d 903, 906 (6th Cir. 1988).

nized. It is settled that a failure to disclose exculpatory evidence during the course of criminal proceedings is shielded by prosecutorial immunity. *See Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862-64 (2009); *Imbler*, 424 U.S. at 431 n.34.

Due process forbids investigative tactics that "shock[ ] the conscience." *Lewis*, 523 U.S. at 846-47. A prosecutor's knowing use of perjured testimony at trial surely satisfies this standard, and has long been held a denial of due process, *see, e.g., Napue v. Illinois*, 360 U.S. 264, 269-70 (1959), even though, as we explain above, such violations are immunized from damages liability. Petitioners' pre-charging conduct, in contrast, deprived no one of liberty; moreover, it could result in no abuse of governmental power as long as petitioners' subsequent decisions about whether to charge respondents and how to proceed in the ensuing litigation were made in a manner consistent with the Constitution. Pressing potential witnesses to a violent crime and failing to disclose exculpatory evidence during the investigative stage accordingly was not "arbitrary, or conscience shocking, in a constitutional sense." *Lewis*, 523 U.S. at 847 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992)). These tactics would have been entirely unremarkable, in a constitutional sense, as long as the charges against respondents were supported by probable cause, and respondents were then afforded a fair trial at which all exculpatory evidence was disclosed.

In *Van de Kamp*, the Court held that §1983 claims against a District Attorney were barred by prosecutorial immunity because "an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's

claim." 129 S. Ct. at 862. So it is here; an essential element of respondents' alleged due process violation—like the alleged Fourth Amendment violation—is petitioners' immunized charging and disclosure decisions.

B. Petitioners' Pre-Charging Conduct Is Shielded By Prosecutorial Immunity.

The lower courts believed that prosecutorial immunity did not attach in this case until petitioners filed formal charges, relying on this Court's decision in *Buckley*, in which the Court held that when prosecutors engage in investigative activities indistinguishable from those usually handled by the police, they are entitled to only qualified immunity. *See* 509 U.S. at 273-74.

This rigid division between prosecutors' pre- and post-charging activities is inconsistent with the realities of the prosecutive function. In *Buckley* itself, the Court acknowledged that "'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom,' and are nonetheless entitled to absolute immunity." 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33). Although the Court noted that the prosecutors in that case did not have probable cause to charge anyone when they allegedly engaged in the fabrication of evidence, *see id.* at 274, the Court stressed that immunity turned on a "function test," adding that absolute immunity is inappropriate "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer." *Id.* at 273.

In this case, petitioners have not been sued for mere investigative activities. Once Hughes told the

detectives that he knew about the Schweer murder, petitioners were not simply sifting clues and trawling for evidence, but instead had assumed the advocate's role of evaluating the prosecutive merits of a case based on Hughes' account. That is an advocate's function, even though it involved working with witnesses to assess whether their accounts provided a basis for bringing charges.

In *Buckley*, for example, the Court acknowledged that "an out-of-court 'effort to control the presentation of [a] witness' testimony' was entitled to absolute immunity because it was 'fairly within [the prosecutor's] function as an advocate." 509 U.S. at 272-73 (quoting *Imbler*, 509 U.S. at 430 n.32 (brackets in original)). Petitioners' pre-charging function was little different. Petitioners were working with Hughes to determine whether to file charges rather than preparing for a trial on a pending charge, but one of "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution . . . ." *Imbler*, 424 U.S. at 431 n.33; *see also Buckley*, 509 U.S. at 284 (Kennedy, J., concurring in part and dissenting in part) ("Actions in obtaining, reviewing, and evaluating witness testimony are a classic function of the prosecutor as advocate.") (citation and internal quotations omitted).

This Court rejected the mechanical approach to prosecutorial immunity taken below only last Term. *Buckley* stated that "when a prosecutor 'functions as an administrator rather than as an officer of the court' he is entitled only to qualified immunity." 509 U.S. at 273 (quoting *Imbler*, 424 U.S. at 431 n.33). In *Van de Kamp*, however, while the Court acknowledged that supervisory prosecutors had been sued in

that case for their role in establishing "the office's administrative procedures," 129 S. Ct. at 861, it held that supervisory policy decisions about how exculpatory information is made available are immunized because "[t]he management tasks at issue . . . concern how and when to make impeachment information available at a trial." *Id.* at 863.

Thus, it is the character of the challenged decision, rather than the point in time when it occurs, that controls the immunity inquiry. In this case, petitioners' efforts to shape witness testimony were directed at building a case for charging and trial, and for that reason are immunized. Indeed, a number of courts of appeals have concluded that even pre-charging conduct qualifies for absolute immunity when it is directed at producing evidence to be used at trial or other judicial proceedings. *See, e.g.*, *Cousin v. Small*, 325 F.3d 627, 633-35 (5th Cir.), *cert. denied*, 540 U.S. 826 (2003); *Higgason v. Stephens*, 288 F.3d 868, 877-78 (6th Cir. 2002); *Kohl v. Casson*, 5 F.3d 1141, 1146-47 (8th Cir. 1993).

If *Buckley* is understood to take a rigid temporal approach to immunity, asking only if a challenged prosecutive decision occurred prior to charging or the acquisition of probable cause, it is inconsistent with the realities of the prosecutive function. The process of developing the prosecution's case does not begin with charging; much of a prosecutor's pre-charging deliberations involve the advocate's role of assessing a case to determine whether it is sufficient to establish probable cause to charge. Prosecutors, of course, are expected to bring charges only upon evidence sufficient to sustain a conviction. *See* ABA Standards, *supra*, Prosecution Function Standard 3-3.9(a). *Buckley* is therefore inconsistent with the functional

test the Court has used for immunity. It also conflicts with the subsequent decision in *Van de Kamp*, which, as we explain above, concluded that the functional significance of a prosecutor's decision controls the immunity inquiry, rather than the question whether it occurred after charges were filed.

Buckley's approach has also proven difficult to apply because it makes immunity determinations turn on fact-intensive questions about when the prosecutors acquired probable cause and the capacity in which particular decisions were made. *See, e.g.*, *Broam v. Bogan*, 320 F.3d 1023, 1033-34 (9th Cir. 2003); *Hill v. City of New York*, 45 F.3d 653, 662-63 (2d Cir. 1995). An immunity test that turns on such a fact-intensive inquiry will often require substantial evidentiary proceedings, thereby undermining one of the central objectives of immunity—sparing prosecutors from the burden and distraction of civil litigation.

In addition, to the extent that *Buckley* makes immunity turn on whether a prosecutor is sued for actions occurring when there was probable cause to charge, it is inconsistent with the traditional test for immunity. This Court has analogized actions seeking damages for wrongful prosecutions and convictions to the tort of malicious prosecution because malicious prosecution was the common-law tort that permitted recovery of damages for confinement pursuant to legal process. *See Wallace v. Kato*, 549 U.S. 384, 388-90 (2007); *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). Yet, as we explain above, the common-law immunity that this Court has incorporated into § 1983 grants prosecutors immunity on malicious prosecution claims even though an element of that tort was the absence of probable cause. As Justice

Kennedy observed in *Buckley*, "the central component of a malicious prosecution claim is that the prosecutor in question acted maliciously and *without probable cause*." 509 U.S. at 286 (opinion concurring in part and dissenting in part) (emphasis in original). *Buckley*'s conclusion that a lack of probable cause is a basis to deny immunity is therefore inconsistent with the traditional test for immunity.

In *Buckley*, the majority gave no weight to this concern because it could identify "no common-law tradition of immunity" for pre-charging prosecutorial activity, but "found a common-law tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not." 509 U.S. at 274 n.5. Yet respondents seek to treat their confinement following their prosecution and conviction as a compensable wrong, even though there is no tradition of holding those who bring unsupported charges liable for confinement pursuant to legal process except through an action for malicious prosecution, on which the common law recognized prosecutorial immunity. *Buckley* accordingly created a prosecutorial liability without support in the common law.

In determining whether to revisit a precedent, this Court considers the precedent's "workability . . . and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009). Moreover, "[r]evisiting precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson*, 129 S. Ct. at 816. Precisely because plaintiffs have

no vested expectations in judge-made immunity doctrines, the Court has not hesitated to reexamine its constitutional tort immunity rules. *See id.* at 818-22; *Harlow*, 457 U.S. at 814-20.

The *Buckley* rule created no settled expectations that would be upset by its revision; and, as we explain above, it poses difficulties in application and misconceives the role of the prosecutor in the investigative process and the historical grounding for immunity. To the extent that *Buckley* supports the decision below, it should therefore be overruled. [13] As long as a prosecutor's challenged conduct is undertaken in the role of an advocate endeavoring to build the state's case with respect to an immunized decision about charging or the manner in which a criminal case is to be litigated, it should fall within the ambit of prosecutorial immunity.

[13] Accordingly, our submission preserves *Buckley*'s additional holding that a prosecutor lacks absolute immunity for statements made at a press conference, *see* 509 U.S. at 276-78, as well as the holding in *Burns* that prosecutors lack absolute immunity for legal advice given to the police, *see* 500 U.S. at 492-96.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA, JOSEPH HRVOL, AND DAVID RICHTER,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE CATO INSTITUTE, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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IN THE SUPREME COURT OF THE UNITED STATES

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---

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE CATO INSTITUTE, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

This brief is filed on behalf of the National Association of Criminal Defense Lawyers ("NACDL"), the Cato Institute, and the American Civil Liberties Union ("ACLU") as *amici curiae* in support of Respondents, with the written consent of the parties.[1]

INTEREST OF AMICI CURIAE

The NACDL is a non-profit organization with a direct national membership of more than 11,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the proper and fair administration of criminal justice. Nothing is more central to the fairness and the integrity of the

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[1] As required by Rule 37.6 of this Court, *amici curiae* submit that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

criminal justice system than the right, which is at the heart of this case, not to have false evidence manufactured by law enforcement officials for the purpose of depriving citizens of their fundamental right to liberty.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. Cato is interested in this particular case because it implicates the remedies citizens have when government officials acting under color of law violate their constitutional rights.

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Iowa is one of its statewide affiliates. Since its founding in 1920, the ACLU has been committed to ensuring the fairness and integrity of the criminal justice system,

and to providing meaningful redress for those whose rights are violated. In furtherance of that goal, the ACLU has been involved in numerous cases before this Court interpreting the scope of official immunities.

SUMMARY OF ARGUMENT

In 1977, the Petitioners in this case, David Richter and Joseph Hrvol, worked side by side with police to investigate the notorious murder of a former police officer in Pottawattamie County, Iowa. At the time, Richter was county attorney and seeking re-election to that position; Hrvol was an assistant county attorney. Anxious to "solve" the crime, Petitioners participated in fabricating evidence against Respondents, who were 16 years old, and then used the evidence to charge and convict them. After Respondents spent 25 years in prison, their convictions were overturned based on Petitioners' prosecutorial misconduct. Petitioners now advance a series of "policy" arguments for why this Court should abandon its oft-expressed reluctance to expand absolute immunity and protect all prosecutors from § 1983 liability for intentionally causing witnesses to fabricate testimony – so long as it is the same prosecutors who later use that testimony at trial. Such a result would deeply *offend* public policy concerns and the Constitution, not serve them.

1. This Court has held that prosecutors are only entitled to qualified immunity when they perform an investigatory function. Here, there is no doubt that Petitioners were acting in an investigatory capacity when they fabricated evidence against Respondents. Nevertheless, Petitioners seek to avoid liability for their investigatory misconduct by arguing that there is no constitutional violation until the fabricated evidence is used at trial, and that a prosecutor may not be sued for the use of fabricated evidence at trial because a prosecutor's decisions are shielded by absolute immunity. Proceeding from that premise, Petitioners then assert that their absolute prosecutorial immunity relates back to their earlier investigatory decision to fabricate probable cause as a basis for Respondents' arrests. That approach turns immunity analysis upside down. Under this Court's jurisprudence, the question of whether absolute or qualified immunity applies is a functional one and necessarily precedes the question of whether or not a constitutional violation has occurred. Petitioners, by contrast, attempt to merge the two inquiries in an effort to stretch absolute immunity beyond anything this Court has ever authorized.

2. As the courts below correctly held, the absolute immunity question presented by this case is controlled by this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), which also

involved the manufacturing of false evidence by a prosecutor during the investigative phase. That the prosecutors in this case also were the ones to utilize such evidence at trial cannot be related backwards to retroactively immunize their earlier misconduct. This fact at most relates to the viability of Respondents' constitutional claim seeking to hold Petitioners liable for their investigative misconduct.

Petitioners attempt to avoid the controlling logic of *Buckley* by instead focusing on various policy concerns that they contend warrant recognizing absolute immunity in this case, but they utterly fail to overcome the applicable *presumption*, *see Burns v. Reed*, 500 U.S. 478, 486-87 (1991), that qualified immunity suffices.

First, Petitioners' concept of absolute immunity sweeps far too broadly and would have the perverse effect of relieving investigatory prosecutors from liability for intentional and outrageous misbehavior that *should be* deterred. Qualified immunity has proven entirely adequate to preserve the ability of law enforcement to vigorously investigate criminal activity without being chilled by the fear of personal liability. It is no less adequate for prosecutors. For both police and prosecutors performing an investigatory role, qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law."

Burns v. Reed, 500 U.S. at 494-95 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Petitioners and their *amici* supply no evidence that lawsuits for investigative misconduct by prosecutors are common – they cite 11 over 33 years – and no basis to conclude that prosecutors have been or will be deterred by fear of them. Nor do they show that the few such lawsuits that get past qualified immunity and pleading requirements will be any more distracting to prosecutors than far more common collateral attacks on convictions or the serious inquiries by disciplinary bodies that they argue would adequately deter misconduct. Indeed, where, as here, police defendants are already named in a lawsuit, prosecutors who worked with them in allegedly fabricating evidence will have to testify and provide documents regardless of whether they are defendants or third parties, and they will be defended and indemnified by their employer in either case.

Second, the contention by Petitioners and their *amici* that there are other, better means to deter investigatory misconduct by prosecutors, such as bar or intra-office discipline, is refuted by numerous reports and studies. Petitioners cite a handful of highly notorious cases in which public exposure of extreme misconduct was followed by discipline, but the overall reality is that for each revelation of

misconduct by a prosecutor that is followed by some personal sanction, a hundred are not. Attorney disciplinary committees have a mechanism for investigating such misconduct, but typically lack the staff and the expertise; prosecutors' offices have the expertise to conduct such investigations, but rarely do so. There is far more regulation and discipline of police, by civilian and internal review boards, than there is of prosecutors who perform the same investigative functions. It would be anomalous to favor prosecutors with absolute immunity, but not police, when it is only the police who face any real alternative sanction to deter them from misconduct.

3. The Court should reject Petitioners' hyper-technical argument that Respondents have not stated a valid cause of action because it was solely Petitioners' immunized *use* of the fabricated evidence at trial that caused Respondents to suffer constitutional injury. As the Respondents convincingly argue in their brief, the fabrication of evidence for the purpose of depriving a citizen of his liberty, which then results in such deprivation, violates the due process clause of the Constitution, and is actionable under § 1983. *See, e.g., Malley v. Briggs*, 475 U.S. 335 (1986). That the fabricator elects to use the evidence himself rather than to hand it to a colleague to do his dirty work just exacerbates his own original wrongdoing; it cannot possibly relieve him of responsibility for it.

ARGUMENT

I. AS A MATTER OF POLICY AS WELL AS PRECEDENT, ABSOLUTE IMMUNITY SHOULD NOT BE EXTENDED TO SHIELD FROM CIVIL LIABILITY PROSECUTORS WHO FUNCTION SIDE BY SIDE WITH POLICE DETECTIVES DURING THE INVESTIGATION OF A CRIME TO FRAME A 'SUSPECT' BY FABRICATING 'EVIDENCE' AND THEN GIVE THAT 'EVIDENCE' ITS INTENDED USE BY INTRODUCING IT AT A CRIMINAL TRIAL

A. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), Controls the Absolute Immunity Question Presented by This Case

Section 1983 creates a damages remedy against "every state official for the violation of any person's federal constitutional or statutory rights." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). The language of the statute explicitly subjects a state official to liability not just for "subject[ing]" a citizen to a federal constitutional "deprivation," but also for "caus[ing]" such an injury. 42 U.S.C. § 1983. The statute must be broadly construed to protect persons wronged by the misuse of state power by providing

compensation and providing remedies that will deter future such misconduct. *Owen v. City of Independence*, 445 U.S. 622, 650-51 (1980).

Nevertheless, in *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court held that "in initiating a prosecution and in presenting the State's case, [a] prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431. The Court based this holding upon the common-law rule of immunity for *judicial* functions that presumably guided Congress when it enacted § 1983, as well as "considerations of public policy that underlie the common-law rule." *Id.* at 424. In reaching this conclusion, the *Imbler* Court assumed there were alternative ways, including professional discipline, to deter prosecutorial misconduct at trial. *Id.* at 429.

Since *Imbler*, the Court has recognized that prosecutors can and do perform different functions, and that the level of immunity that applies is determined by the role the prosecutor is playing. More specifically, the Court has made clear that prosecutors, like the police, are only entitled to *qualified* immunity when they are acting as criminal investigators. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). Based on that distinction, the Court has declined to extend *Imbler* even in cases where the relationships between the challenged conduct and criminal proceedings were closer than here.

See, e.g., Burns v. Reed, 500 U.S. 478 (1991) (only qualified immunity for providing advice to police that contributes to a misleading arrest warrant application intended to bring a suspect before the court for criminal proceedings); *Buckley, supra* (only qualified immunity for obtaining a false expert opinion during a matter's investigative stage for later use at a criminal trial); *Kalina v. Fletcher*, *supra* (only qualified immunity for acting like a complainant in personally attesting to the truth of facts necessary to obtain an arrest warrant that is intended to initiate criminal proceedings). *Compare Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009) (absolute immunity for District Attorney for adopting prosecutorial policies relating to *Giglio* disclosure that solely relate to and affect how criminal trials will be conducted); *Burns v. Reed*, 500 U.S. at 492 (absolute immunity for prosecutors who present evidence in *court* in support of a search warrant application).

In analyzing the immunity question in these and other cases, the Court has "emphasized that *the official seeking absolute immunity bears the burden* of showing that such immunity is justified for the function in question [citations omitted]. The *presumption* is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties," and the Court's application of absolute immunity has been "quite

sparing." *Burns v. Reed*, 500 U.S. at 486-87 (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988) (emphasis added)). The Court has further cautioned: "[O]ur role is 'not to make a freewheeling policy choice,' but rather to discern Congress' likely intent in enacting § 1983. 'We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.'" *Burns v. Reed*, 500 U.S. at 493 (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986), and *Tower v. Glover*, 467 U.S. 914, 922-23 (1984)).

Any need to expand the scope of prosecutorial immunity after *Imbler* was eliminated by the Court's reformulation of the qualified immunity test soon thereafter. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court replaced the common law subjective or good-faith test for qualified immunity under § 1983 with a two part objective standard, under which a plaintiff must show *both* that the official violated a clearly-established constitutional rule of conduct *and* that no reasonably trained official in his position could have believed his conduct was lawful. As the Court recognized in *Burns*, "the qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided." 500 U.S. at 494. Qualified immunity now provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Malley*,

475 U.S. at 341). In cases like this, where the law is clear, prosecutors who are trained in the law "should be made to hesitate." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

The absolute immunity issue that Petitioners raise is easily resolved under the Court's functional test and its application of that test in *Buckley*. Here, as in *Buckley*, the function in question was the deliberate manufacturing of false evidence during a criminal investigation, before there was any definite suspect and, once there was a suspect, before there was probable cause to believe he was guilty of the crime. The only "difference" is that in *Buckley* the false "evidence" was elicited from an expert, whereas here it was manufactured by law enforcement authorities through the coercion of vulnerable teenagers. Indeed, this case is far easier than *Buckley*, since the misconduct here began earlier in the investigation, involved fabricating false testimony to frame innocent suspects as opposed to shopping for an expert witness, and was pervasive. Petitioner Hrvol, in particular, could just as easily have been on the payroll of the Police Department as of the County Attorney, since he was assigned to *investigate* and was not assigned to prosecute when the key evidence, including Hughes' false story, was fabricated. A ruling in petitioners' favor would overrule *Buckley* or eviscerate it.

Petitioners contend that this case is different than *Buckley* because here the same prosecutors who manufactured the false evidence were involved in using it at trial to harm Respondents. They take the liberty of reformulating Respondents' claim as one limited to the infliction of injury at trial through the *use* of fabricated evidence to achieve a conviction, as opposed to the fabrication of the evidence itself with the intention to so use it. But this is *Respondents'* lawsuit and that is not how they formulate their claim. "[W]hether the plaintiff has alleged a deprivation of a constitutional right at all" is a matter that is addressed in a qualified immunity analysis, *see, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998), not under absolute immunity principles. Absolute immunity, as the Court made clear in *Buckley*, focuses on the nature of the civil defendant's *function* when he committed the acts of which the plaintiff complains, not whether those acts are sufficient to make out a valid claim. It is difficult to accept that this Court would have decided the absolute immunity issue in *Buckley* differently had Fitzsimmons won re-election and been able to prosecute Buckley himself with the false evidence that he had previously procured.

B. Petitioner Has Failed to Demonstrate Any Need for the Application of Absolute Immunity to Protect Prosecutors Who Assist, Advise, or Supplant Police In Fabricating Evidence During a Criminal Investigation and Then Utilize That Same Evidence to Prosecute or Convict An Innocent Criminal Defendant

1. Qualified Immunity Suffices

The concern that legitimate pre-prosecution activity by prosecutors not be over-deterred is more properly addressed by qualified immunity, which requires a plaintiff to establish not only that the prosecutor's investigative activities violated a specific, clearly-established constitutional standard of behavior, but also that no reasonable official could have believed that the prosecutor's behavior complied with such rule. Only where a plaintiff can prove that a prosecutor not only pressured or induced a prospective witness but also deliberately supplied him with, or wilfully encouraged him to adopt, a story that the prosecutor *knew* was false, will questionable "interviewing" techniques cross the qualified immunity line and subject such a prosecutor to liability for fabricating evidence during

a criminal investigation. No prosecutor need fear liability "simply for interviewing." The States of Colorado, *et al.*, Br. at 4.

There are additional practicalities of civil rights litigation that would relieve conscientious prosecutors of any reasonable fear of being sued for good-faith investigatory activities. They include pleading requirements, *see e.g. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), as well as the reality that few juries are going to believe a witness, who admits he perjured himself and blames it on the prosecutor, over the denials of the prosecutor and the police officers with whom he worked. And in the exceedingly unlikely event that the prosecutor lost the case and was held individually liable, the county or state that employed him, as *amici* point out, would almost certainly indemnify him for his damages. *See* Nat'l Ass'n of Counties, *et al.*, at 11-12, *citing Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting).

Petitioners assume it is self-evident that it is desirable to have prosecutors present to advise or assist police when they interview witnesses during an investigation, but this might surprise Harrington and McGhee, as well as the victims of the day-care center sexual abuse witch-hunts of the 1980s. *See, e.g., Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc); *Michaels v. McGrath*, 222

F.3d118, 122-23 (3d Cir. 2000), *cert. denied*, 531 U.S. 1118 (2001). Prosecutors are trained, or at least, as Justice Kennedy has pointed out, it is traditionally their function, "to examin[e] the evidence to determine whether it will be persuasive at trial and of assistance to the trial of fact," whereas it is a traditional police function to "examine[] the evidence to decide whether it provides a basis for arresting a suspect." *Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part). If the facts show that all a prosecutor did was perform his traditional function of observing a police interrogation of a witness in order to evaluate the witness for possible use in the grand jury or at trial, then such prosecutor might well have absolute immunity (and qualified immunity as well) – but those are not the facts of *this* case.

This case is much closer to *Burns v. Reed*, in which the majority held that a prosecutor who provides *advice* to detectives does *not* have absolute immunity. A prosecutor who functions side by side with police trying to "solve" the crime by actively participating in fabricating evidence is, if anything, even less entitled to immunity than if he advises the police to do the same thing on their own. *See Buckley*, 509 U.S. at 275 ("After *Burns*, it would be anomalous, to say the least, to grant prosecutors only qualified immunity when offering legal advice to police about an arrested suspect, but then to endow

them with absolute immunity when conducting the investigative work themselves in order to decide whether a suspect may be arrested. That the prosecutors later called a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial" [footnotes omitted]).[2]

The traditional dichotomy in function between police who gather evidence and prosecutors who evaluate its usefulness for prosecution is salutary because it enhances the reliability of the evidence that prosecutors ultimately present in judicial proceedings – or at least that is the goal. The more deeply invested a prosecutor becomes in an investigation, especially an overzealous or dishonest one, the less likely will his prosecutorial review of the evidence be truly independent. A rule that an investigatory prosecutor who personally presents fabricated evidence at trial has absolute immunity

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[2] *Amici* expresses concern that some state laws command prosecutors to direct homicide investigations and sometimes, such as in financial investigations, prosecutors may conduct investigations unassisted by any government agents. *See* The States of Colorado, *et al.* Br. 6-7 & nn. 2-3. This only serves to prove that prosecutors often function indistinguishably from police detectives. That a state or municipality may elect to shift investigative responsibility to employees of a prosecutor's office is no basis to immunize all wrongful conduct that may occur.

for the fabrication, but a prosecutor who hands off the evidence to another does not, will only discourage the independent review that absolute immunity is intended to encourage and protect. It will centralize in one enormously powerful individual the police and prosecutorial functions that traditionally have been separate and eliminate a significant check on the power of the police. Such a vertical system may have its benefits, but it does not deserve to be enshrined with special constitutional status.[3]

2. Experience Since *Imbler* Proves That There Are No Effective Alternatives to § 1983 Liability for Deterring Investigative Misconduct by Prosecutors

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[3] If Petitioners are right that a prosecutor has absolute immunity for fabricating evidence that he intends to use in a criminal proceeding, because the use of it is prosecutorial, then the extension of that argument might be that police detectives who act under his direction, or with his full knowledge, would enjoy the same immunity. In the latter case, too, under Petitioners' theory, it would be the prosecutor's absolutely immunized act of using the evidence that caused the criminal defendant to be harmed, not the earlier concerted activity to create it. Thus, the insertion of a "prosecutor" to work with police during a bad-faith criminal investigation might inoculate the police against any risk of civil liability for framing an innocent man.

The "empirical" evidence upon which Petitioners and *amici* rely to establish the need for absolute immunity for prosecutors who manufacture false evidence and then use it in a criminal prosecution utterly fails to do so.

1. Petitioners' *amici* contend that permitting lawsuits against prosecutors who allegedly have fabricated evidence during criminal investigations will chill prosecutors' legitimate exercise of discretion. *See* Nat'l Ass'n of AUSAs, *et al.*, Br. 6-7. But *amici* present no persuasive evidence, indeed, virtually no evidence at all, to prove their speculation.

It is 33 years since *Imbler* left open the possibility of lawsuits against prosecutors for investigative misconduct, and 16 years since *Buckley* clearly rejected absolute immunity for such behavior, but the States' *amicus* brief, while claiming that prosecutors are "frequently" sued for investigative interviewing, cites just 11 such cases during those 33 years, while providing no information that any of them were burdensome, let alone succeeded. *See* States' Br.17-18, & n.5. Meanwhile, *amici* Counties point out that state and local governments indemnify and defend prosecutors against such lawsuits, that they are, in any event, professionals who will not be affected by remote fears of civil liability, and that therefore the threat of civil liability will have no

effect on them at all. Brief of the Nat'l Ass'n of Counties, *et al.*, at 11-13, 15.

Indeed, the main point of the *amici* briefs seems to be not that such lawsuits will succeed, for they cite statistics that civil rights lawsuits succeed far less often than traditional tort actions, see Nat'l Ass'n of AUSAs, *et al.* Br. 5 n.3, but rather that such lawsuits will deter prosecutors out of fear of being inconvenienced or distracted from their intended functions. But *amici* present *no* evidence that this has ever occurred since *Imbler* and *Buckley*. By the nature of their job, prosecutors are used to court proceedings and are naturally equipped to deal with depositions or document-production. They may employ procedural rules to oppose unduly burdensome or intrusive discovery. Moreover, in lawsuits, such as this one, that name police and others as defendants, they may be required to testify, and to disclose documents, regardless of whether they have the status of defendant or third party witness. The distraction, rare and minor as it is in relation to their other duties, occurs regardless.

Moreover, the "fear" that prosecutors will be required to explain or defend their actions years after a criminal conviction has occurred will be realized far more often during the motion and hearing practice that accompanies collateral attacks on convictions and whenever a disciplinary body conducts a truly

searching investigation of prosecutorial misconduct allegations. The rare civil rights suit that survives dismissal on qualified immunity or pleading grounds will not add much to the burden. The Court has regularly turned back similar policy arguments where prosecutors have sought blanket immunity for non-prosecutorial functions. *See, e.g., Kalina v. Fletcher*, 522 U.S. at 131 (Court "not persuaded" by prosecutors' concern about "chilling effect"); *Burns v. Reed*, 500 U.S. at 494 ("the concern with litigation in our immunity cases is not merely a generalized concern with interference with an official's duties, but rather a concern with interference with the conduct closely related to the judicial process").

2. Petitioners' *amici* further contend, citing *Imbler*, that there is no need for a civil remedy because prosecutors who engage in investigative misconduct are subject to, and will be, disciplined by outside professional disciplinary authorities or by their own offices. *See* Nat'l Ass'n of AUSAs, *et al.* Br 8-14. Tellingly, however, they cite just six specific instances since *Imbler* in which outside investigation or discipline occurred, *see id.* at 9, 11, 11 n.5, and just three instances in which local prosecutors' offices disciplined their own employees (all of but one of which overlap with the outside discipline examples), *see id.* at 11, 13.[4] All of these cases were notorious

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[4] *Amici* also refer to the findings contained in the Department of Justice's Office of Professional Responsibility

and extreme, and most also involved additional allegations of theft or other criminal or dishonest activities. *See, e.g.*, Fred C. Zacharias, *The Professional Discipline of Prosecutors,* 79 N.C. L. Rev. 721, 755 (2001) (noting that "discipline rarely occurs unless a lawyer has committed multiple violations of the professional codes."); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 275, 296 (2007) (terming the "Duke lacrosse" discipline the "Mike Nifong exception" because the "case undoubtedly has left the public with misperceptions about prosecutorial misconduct and the extent to which it is punished.") That petitioners Hrvol and Richter have not been investigated or disciplined by the Iowa attorney disciplinary committee undermines *amici's* use of Iowa's disciplinary mechanism as an

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(OPR) 2005 Annual Report as an example of regular, effective, internal discipline of prosecutors found to have committed misconduct. But there is no way of discerning from that report, based upon confidential investigations, how often – if ever – investigative misconduct is reported or how seriously it is taken. Indeed, the 2005 Annual Report does not cite any examples of investigation or discipline of prosecutors for misconduct committed during the investigative stage; the majority of disciplinary categories listed do not involve the fairness of investigations or trials. *See* U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005, at 6. Moreover, the Justice Department appears to be unique in having an independent arm to conduct internal disciplinary reviews – *amici* cite no other examples.

example of an adequate alternative remedy for prosecutorial misconduct.

The unfortunate reality is that, regardless of a prosecutor's *theoretical* "amenability to professional discipline by an association of his peers," *Imbler v. Patchman*, 424 U.S. at 429, the discipline that the *Imbler* Court reasonably expected to occur in the wake of its decision has occurred with shocking rarity. Prosecutorial misconduct remains a substantial cause of wrongful convictions, yet the offending attorneys are virtually never disciplined.

The New York State Bar Association Task Force on Wrongful Convictions ("Task Force") recently found that prosecutorial misconduct was a substantial cause of wrongful convictions in the state, but that prosecutors rarely were disciplined, either by their own offices or by state disciplinary authorities. *See* Final Report of the New York State Bar Association's Task Force on Wrongful Convictions (2009) ("Task Force Report"), at19, 29-31, *available at* http://www.nysba.org/Content/ Content Folders TaskForceonWrongfulConvictions/ FinalWrongfulConvictionsReport.pdf. The Task Force assembled a panel of judges, prosecutors, and defense attorneys to "identify[] the causes of wrongful convictions" and "attempt to eliminate them." Task Force Report, at 5. The Task Force studied 53 cases of wrongful convictions that were overturned by

"exoneration," and conducted hearings at which practitioners from both sides, and exonerated individuals themselves, testified. *Id.* at 5, 17. It concluded that 31 of those wrongful convictions were attributable to "governmental practices." *Id.* at 7.[5] Yet, it reported, "research has not revealed *any* public disciplinary steps against prosecutors." Task Force Report at 29 (emphasis added).

The Task Force surveyed District Attorneys in New York, 20 of whom responded to a written questionnaire, to determine "whether sanctions [for prosecutorial misconduct] had ever been imposed,"and found that just *one* prosecutor had been referred to an outside attorney disciplinary committee by these offices and just *one* prosecutor had been sanctioned internally. *Id.* at 30. Testimony the Task Force credited revealed that, despite findings by courts of prosecutorial misconduct in approximately 200 cases between the late 1970's and 2003 prosecuted in several counties, only two prosecutors in those counties had been disciplined by their own offices.[6] *Id.* at 31. Thus, the Task Force

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[5] The Task Force defined "governmental practices" to include the use of false testimony, violation of *Brady*, improper evidence retention or transfer, and refusal to investigate alternative suspects to crimes. Task Force Report, at 19.

[6] This information primarily came from evidence disclosed in civil rights lawsuits brought against the City of New York.

concluded, in a section focusing on *Brady* disclosure,"there is little or no risk to the specific individual [prosecutor] resulting from a failure to follow the [*Brady*] rule." *Id.* at 29.

In California, the Commission on the Fair Administration of Justice ("Justice Commission"), made similar findings. The Justice Commission analyzed 2,131 California cases where claims of prosecutorial misconduct had been raised. *See* Final Report, California Commission on the Fair Administration of Justice (Gerald Uelmen ed., 2008) *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf, at 71. While courts had found prosecutorial misconduct in 444 of these cases, the Justice Commission focused on 54 cases that resulted in the reversal of the conviction and which, pursuant to California Law, should have been reported to the state bar association for disciplinary investigation. *Id.* The Commission could not find a single instance where any such referral was made. *Id.* The Commission concluded that "our reliance upon the State Bar as the primary disciplinary authority is seriously hampered by underreporting." *Id.* Moreover, the Justice Commission cited no specific examples of internal discipline in those cases, or any others. *See id.* at 73-74.

A study conducted by the Chicago Tribune in 1999 found that out of 381 nationwide reversals in

homicide cases (67 of which carried death sentences) since 1963 for "using false evidence or concealing evidence suggesting innocence," only "one [prosecutor] was fired, but he appealed and was later reinstated with back pay"; "another received an in-house suspension of 30 days"; and a "third's law license was suspended for 59 days, but for other misconduct in the case." Maurice Possley & Ken Armstrong, *The Verdict: Dishonor*, Chicago Tribune, January 11, 1999, at C1 and Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial*, Chicago Tribune, January 11, 1999, at C1. None were disbarred or received any public sanction. *Id.*

Legal scholars and commentators agree: "prosecutors are rarely, if ever, punished" by professional disciplinary bodies, even when engaged in "egregious" misconduct. Shelby A.D. Moore, *Who is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn To Uphold?*, 47 S. Tex. L. Rev. 801, 807 (2006). A comprehensive study of *all* reported cases across the country of professional discipline for prosecutorial misconduct found only 27 instances in which prosecutors were disciplined for unethical behavior occurring at and affecting the fairness of criminal trials.[7] Zacharias, *supra*, at 751-54, Tables

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[7] As opposed to "plainly illegal activity," such as "bribery, extortion, conversion, and embezzlement," or "allegedly abusive behavior towards tribunals, usually

VI & VII (2001). *See also*, Bennett T. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 722 (2006) ("most commentators agree that professional discipline of prosecutors is extremely rare"); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. Rev. 275, 276 n.7 (2004), *citing* Bennett T. Gershman, Prosecutorial Misconduct, § 14.1, n.5 (2d ed. 2001) (citing "hundreds of cases of flagrant misconduct, none of which resulted in punishment"); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 718-720, 730 (1987) (finding only nine cases where professional discipline of prosecutors was sought for "*Brady*-type" violations, and only six where it was actually imposed, after conducting an exhaustive search of myriad materials, as well as surveying bar counsel in all states). *See also* Jeffrey Weeks, *No Wrong Without a Remedy*, 22 Okla. City. U. L. Rev. 833, 881 (1997) (updating Rosen's research 10 years later to add only seven additional cases where discipline was sought, and only four where it was imposed).

As persuasive as these statistics are, even more compelling are the individual reported accounts of the failure to discipline prosecutors who, either intentionally, or with cavalier disregard, obtain

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consisting of criticism of judges." *Id.* at 744-47.

convictions by violating the due process rights of the accused. Sadly, Messrs. McGhee and Harrington do not stand alone, both in the manner in which their rights were trampled and in the fact that the perpetrators in the prosecutor's office went unpunished.

Alberto Ramos, a 21-year-old college student and part-time child care worker, was convicted in 1985 of forcibly raping a five-year-old girl at the day care center where he worked. *See* Stephen Gillers, *In the Pink Room,* in 124 TriQuarterly 257 (Leigh Buchanan Bienen et al., eds., Northwestern U. Press), discussing *People v. Ramos*, 614 N.Y.S.2d 977 (N.Y. App. Div. 1st Dept. 1994). The prosecutor deliberately concealed evidence in her file showing that Ramos almost certainly was innocent of the crime and that the crime never occurred. *Id.* Only because of discovery in a *civil* case that the child's mother brought against the New York City-funded day care center was the suppressed discovery revealed, seven years after Ramos's conviction and after he had been repeatedly beaten and sexually assaulted in prison. *See* Gillers, *supra*, at 261; *Ramos*, 614 N.Y.S. at 980. The Bronx District Attorney's Office vigorously fought Ramos's successful motion to vacate his conviction and brought a frivolous appeal that the appellate court resoundingly rejected. *See Ramos,* at 983-94. Discovery in Ramos's subsequent lawsuit against the

City of New York revealed that, out of 72 reported cases of prosecutorial misconduct, only one prosecutor, who had been named in repeated appellate reversals, was disciplined in any respect. *See* Yaroshefsky, *supra*, at 281-82 (noting that the prosecutor was "suspended for four weeks and lost two weeks pay," and on his return was immediately granted a bonus and a series of merit increases). As for Ramos's prosecutor, even though both the trial and appellate courts found, at the very least, that she had handled Ramos's case in a "cavalier and haphazard" manner, *People v. Ramos*, No. 3280/08, Slip. Op. at 8 (N.Y. Sup. Ct. June 1, 1992), *aff'd*, 614 N.Y.S.2d 977 (N.Y. App. Div. 1st Dept. 1994), the New York State attorney disciplinary committee failed to institute any professional sanctions -- not even a private reprimand. Yaroshefsky, *supra*, at 281 n.26. *See also Ramos v. City of New York*, 729 N.Y.S.2d 678, 682 (N.Y. App. Div. 1st Dept. 2001) (conduct in *Ramos* prosecution was "far astray" from "diligence," calling "good faith," and "even honesty," into question). The disciplinary committee conducted a secret interview of the prosecutor and "closed the investigation without affording Ramos or his counsel any notice or opportunity to be heard." *Id.* at 281 n. 27.

Similarly, no professional discipline was meted out in the troubling case of Delma Banks. *See Banks v. Dretke*, 540 U.S. 668 (2004). This Court reversed

and remanded Banks's capital murder sentence based on the Texas prosecutors' withholding of evidence undermining key witnesses' credibility at trial, their knowing failure to correct false testimony, and their false and/or misleading argument to the jury. *Id.* at 675-76. Banks' prosecutors continued to "hold secret [] key witnesses' links to police and allowed their false statements to stand uncorrected" throughout direct appellate and collateral review proceedings. *Id.* at 675. In all, Banks spent 24 years on death row. *See* Moore, *supra*, at 804. The prosecutors' misconduct in this well-known case could not have been a secret to the Texas professional disciplinary authorities, yet there is no record on file of any discipline of the prosecutors involved, and "it is unlikely the prosecutors will ever be punished for violating Mr. Bank's constitutional rights." *Id.*

Discovery obtained in another civil rights lawsuit, *Shih-Wei Su v. City of New York*, No. 06 Civ. 687 (E.D.N.Y. 2006), revealed that, out of 84 reported cases in Queens, New York, between 1989 and 2003 overturning convictions based on prosecutorial misconduct, not one prosecutor was disciplined either externally or internally. *See* Letter to the Court, dated July 24, 2008, *Su v. City of New York, supra*, Docket No. 111 (Jul. 24, 2008), *available at*, https://ecf.nyed.uscourts.gov/cgi-bin/iquery.pl?100207525478475-L_665_0-1. The prosecutors who escaped discipline included Su's, notwithstanding

Second Circuit Judge Calabresi's conclusion that this prosecutor had "knowingly elicited false testimony from a crucial witness." *Su v. Filion*, 335 F.3d 119, 121 (2d Cir. 2003). One of the cases relied upon by *Su* in his civil lawsuit, *People v. Steadman*, 623 N.E.2d 509 (N.Y. 1993), involved a high-level prosecutor's deliberate creation of an elaborate wall to "'shield' the trial assistants'" from knowledge of his secret promise of leniency to the principal prosecution witness's attorney. 623 N.E.2d at 511-12. The prosecutor was not disciplined despite the finding of New York's highest court that he had made a "determined effort to avoid [] accepted standards of conduct" under state law requiring disclosure of *quid pro quo* deals with witnesses. *Id.*

The lack of prosecutorial discipline may be attributable to an overarching institutional failure of both professional disciplinary committees and individual prosecutors' offices to establish effective procedures to investigate allegations of misconduct.

"Disciplinary authorities have limited resources to prosecute violations of the professional rules." Zacharias, *supra*, at 756 (2001). Properly investigating such claims, particularly if the misconduct occurred during the investigative stage of a case, involves reconstructing events that often occurred several years prior, where little "hard" evidence exists. But most disciplinary committees

function as reactive bodies, making them very effective for sanctioning an attorney who bounced an escrow check, but far less so for determining whether a prosecutor coached a witness to lie under oath. They may be reluctant to take seriously complaints by criminal defendants. *See* Rosen, *supra*, 733-35. Bar disciplinary authorities in many jurisdictions are controlled by the judicial branch and thus "separation-of-powers concerns can also make bar authorities hesitate to intrude on the prosecutor's province." Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Penn. L. Rev. 101, 119-120 (forthcoming 2009), *available at*, http://ssrn.com/abstract=1313215), *citing* Zacharias, *supra*, at 761.

Furthermore, even if professional disciplinary authorities had the administrative capability of meaningfully investigating a significant number of allegations of prosecutorial misconduct, they would still be handicapped by the absence in most states of specific provisions governing prosecutors' pre-charging conduct as investigators. *See, e.g.*, Model Rules of Professional Responsibility, Rule 3.8 (2009) (adopted in some form in most states) (setting forth the "Special Responsibilities of a Prosecutor" relating to the initiation and the conduct of criminal proceedings, but containing no provisions addressing a prosecutor's ethical responsibilities in investigating a case before filing charges); Davis, *supra*, at 284

(noting that Model Rule 3.8 "fails to address" prosecutors' "relations with the police and other law enforcement officers"). Thus, as Zacharias pointed out, "many of the rules of professional conduct [] are blunt instruments — altogether inapplicable, or barely applicable, to full-time prosecutors." Zacharias, *supra*, at 725.

While individual prosecutor's offices, unlike outside bar committees, may have the resources or the knowledge to investigate or discipline, they have not demonstrated the will. Although *amici* argue that prosecutors' offices "often" have internal mechanisms for discipline, Nat'l Ass'n of AUSAs, *et al.* Br. 8, they cite no specific examples other than the Department of Justice's Office of Professional Responsibility. And compelling evidence suggests otherwise. The New York Task Force and the California Justice Commission both found that prosecutors' offices in their respective states lacked consistent or transparent internal policies or procedures for attorney discipline. *See* Task Force Report, at 30; Justice Commission Report, at 73-74. In California, the Justice Commission found a "complete lack of transparency of internal discipline procedures" within state prosecutors' offices, which created a lack of accountability for individuals accused of misconduct. Justice Report, at 73-74. *Amicus* Cook County describes the substantial involvement its prosecutors have in the investigation

of criminal cases, *see* Cook County Br. 5-6, 21-22, but nowhere mentions any procedure for or history of disciplining attorneys for misconduct. When the Chicago Tribune attempted to find out how often Cook County prosecutors are internally disciplined for prosecutorial misconduct, it could not find any instances of prosecutors facing dismissal for misconduct from 1980-1999, even though the Tribune found "trial after trial where prosecutors cheated, lied or spun out of control during arguments before a jury." Possley & Armstrong, *The Flip Side of a Fair Trial*, *supra*.

Finally, *Imbler's* theoretical observation that prosecutors are more amenable to discipline than other state actors, such as police, therefore reducing the need for prosecutorial accountability under § 1983, unfortunately has not proven true in practice. Police officers are subject to internal and external discipline to a far greater extent than most prosecutors. Internally, most police departments have "internal affairs" bureaus comprised of officers assigned to investigate and prosecute crimes committed by their own. In addition, municipalities in 26 states, and Washington, D.C., have civilian review boards that operate outside of the police department to investigate allegations of police misconduct and make recommendations for remedial actions. *See* Police Assessment Resource Center, List of Oversight Agencies, *available at*

http://www.parc.info/oversight_agencies.chtml (listing police oversight agencies by state). Independent investigators, who interview witnesses, gather evidence, and review court documents and transcripts in order to make factual findings, staff many of these civilian review boards. However, there appear to be no disciplinary boards anywhere dedicated to investigating prosecutorial misconduct allegations. Thus, the possibility of outside discipline does not suggest the conclusion that prosecutors should receive more favorable treatment than police for performing the same function. *Buckley*'s refusal to extend absolute immunity to functions that are not uniquely prosecutorial, but are routinely performed by police officers, continues to make sense.

3. Petitioners' *amici* argue that prosecutors are deterred from committing misconduct by the threat of sanctions or reversals by trial or appellate court judges. Nat'l Ass'n of AUSAs, *et al.*, Br. 14. One would hope that this were true, but there is no empirical evidence for it; to the contrary. *Amici* themselves cite the troubling statistic that 16 per cent of all capital cases are reversed on appeal for prosecutorial misconduct, which tends to prove that prosecutors are *not* sufficiently deterred. *Id.* at 14 n.7, *citing* James S. Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases* (2000).

Many prosecutors responsible for misconduct found by courts are "repeat offenders." The California Justice Commission identified 30 such offenders, out of 347 reported decisions of prosecutorial misconduct; two-thirds of these prosecutors committed the same offense more than once. Justice Commission Report, at 74. *See also* Andrea Elliot, *Prosecutors Not Penalized, Lawyer Says*, N.Y. Times, December 17, 2003, at B1 (14 out of 74 Bronx prosecutors found by judges to have committed misconduct were cited in "several cases").

The "horizontal" structure of many prosecutors' offices, in which different attorneys handle trials and appeals, the high rate of turnover in prosecutors' offices, and the fact that few court decisions mention the prosecutor's name, diminish deterrence. *See generally* Zacharias, *supra*, at 770. *See also* Yaroshefsky, *supra*, at 291 ("judicial oversight is unlikely to provide a remedy in most cases").

4. The Solicitor General surprisingly contends that other civil remedies provide just compensation for virtually all victims of prosecutorial misconduct. *See* S.G. Br. 29-33. Yet only 25 states, Washington, D.C., and the federal government have statutes under which the wrongfully convicted may claim compensation. Almost all of these statutes contain substantial barriers to recovery. *See* Howard S. Masters, *Revisiting the Takings-Based Argument*

for Compensating the Wrongfully Convicted, 60 N.Y.U. Ann. Surv. Am. L. 97, 108 (2004-2005) ("most existing compensation statutes require wrongfully convicted individuals to surmount onerous obstacles in order to be eligible for compensation").

In almost all cases, unjust conviction statutes require that, in order to recover, the individual seeking compensation must affirmatively prove his or her innocence of the underlying crime.[8] Moreover, many states impose the further requirement that a claimant show that he or she "did not, by any act or omission on his part, either intentionally or negligently contribute to bringing about his arrest or conviction." *See e.g.* CA PENAL § 4900-4906; N.J. STAT. ANN. § 52:4C-I; W.VA. CODE ANN. § 14-2-13a; WIS. STAT. ANN. § 775.05. This provision often "denies justice to those who were coerced, explicitly or implicitly, into confessing or pleading guilty to crimes it was proven they did not commit." *See* Innocence Project, *Compensating the Wrongfully*

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[8] *See, e.g.*, ME. REV. STAT. ANN. tit. 14 MSRA § 8241 (claimant must receive a written finding from the Governor stating that the person is innocent of the crime for which her or she was convicted); 705 Ill. Comp. Stat. 505/8(c) (same); MD CODE ANN. STATE & FIN. PROC. § 10-501(b) (same); N.C. GEN. STAT. § 148-82 (same); TEX. CIV. PRAC. & REM. ANN. § 103.001(4) (same). *See also* N.Y. CT. CL. ACT § 8-b (claimant must prove innocence by "clear and convincing evidence"); IOWA CODE ANN. ICA § 663A.1 (same); LA REV. STAT. ANN. §15:572.8 (same); N.J. STAT. ANN. § 52:4C-1 (same).

Convicted Fact Sheet, available at http://www.innocenceproject.org/Content/309.php. Finally, many statutes limit recovery to individuals whose convictions were vacated on certain statutory grounds, "consistent with innocence," *see e.g.* N.Y. CT. CL. ACT § 8-b, which may preclude cases where courts vacated convictions based on prosecutorial misconduct.

For example, New York woman Betty Tyson spent 25 years in prison before her conviction was vacated based on a finding that her trial prosecutor withheld exculpatory evidence. *See Tyson v. State*, 698 N.Y.S.2d 410, 415-16 (N.Y. Ct. Cl. 1999). The Court of Claims dismissed her claim for compensation, finding that the legislature had "placed a high threshold upon those seeking recompense under this statute,"and thus, "there can be no recovery here, and no opportunity for her to prove her innocence, perhaps her ultimate goal." *Id.* The indifference of such statutes to constitutional violations makes them a wholly inadequate substitutes for § 1983.

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Petitioners' *amici* agree with us on principle: "There should be serious consequences for prosecutors whose misconduct deprives a criminal

defendant of his or her constitutional rights." *See* Nat'l Ass'n of AUSAs, *et al.* Br. 16. But at present, and since *Imbler*, experience has shown that this rarely is the case. The handful of times it has occurred is no basis to deny relief pursuant to 1983, and will only encourage, rather than deter, such misconduct in the future.

II. PETITIONERS DO NOT ENJOY QUALIFIED IMMUNITY FOR FABRICATING EVIDENCE DURING THE INVESTIGATIVE STAGE MERELY BECAUSE THEY, INSTEAD OF ANOTHER PROSECUTOR, PRESENTED THAT EVIDENCE AT TRIAL

Petitioners and *amici* concede that a police detective may be sued under § 1983 for fabricating false evidence and causing it to be used to frame an innocent man in a criminal prosecution, and so may an investigating prosecutor – so long as the prosecutor hands off the evidence to a colleague but does not use it himself. *See* Pets. Br. 27, SG Br. 32 Thus, under Petitioners' theory, Hrvol and Richter would have been liable for their investigative misconduct had their tainted evidence been handed to another prosecutor who then became the instrumentality of their scheme. Instead, Petitioners contend, in effect, that Hrvol protected himself from

suit by soliciting or accepting the prosecutorial assignment and using the evidence himself.[9]

We agree with Respondents that this cannot be the law. As Judge Newman concluded in *Zahrey v. Coffey*, 221 F.3d 342, 353 (2d Cir. 2000): "It would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty."

Petitioners argue that an investigatory prosecutor is not liable for "merely" fabricating evidence because no one is harmed by the fabrication of evidence that is then locked away in a desk drawer. But this evidence *was* used. That it *could* have been buried (but was not) must not be permitted to obscure that it was employed to destroy the lives of two innocent 16-year-olds, just as petitioners had every reason to anticipate when they created it.

Petitioners argue that the "only" injury inflicted here was Respondents' conviction at trial, without which their due process rights were not violated, but this argument cannot be right. The

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[9] Richter had a minor role at trial that did not directly involve presenting the fabricated evidence, and petitioners do not clearly articulate his claim for immunity.

fabricated evidence was used as the basis to arrest them, to indict them, to detain them in lieu of bail, to defame them in the community where they had grown up, to pressure them to accept a plea bargain, to make them stand trial, to avoid dismissal of the charges at the end of that trial, to force them to endure the unimaginable anxiety of awaiting the jury's verdict, and then to convict them. Had this been a death penalty case, they might long ago have been put to death.

Criminal defendants, the innocent as well as the guilty, face intense pressure to accept plea bargains in lieu of the harsh sentences that are regularly meted out under mandatory or even discretionary sentencing statutes to defendants who go to trial and lose; thus, 95 out of 100 convicted criminal defendants plead guilty.[10] A defendant may feel compelled to accept a plea offer, despite being innocent, without any meaningful information about the identity or the credibility of an informant making the allegation against him, let alone any possibility

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[10] *See* Admin. Office. Of the U.S. Courts. 2007 Annual Report of the Director: Judicial Business of the United States Courts tbl. D-7 (2008), *available at* http://www.uscourts.gov/judbus2007/appendices/D07Sep07.pdf (out of 78,861 defendants convicted in 2007, 75,949 pleaded guilty); Matthew R. Durose & Patrick A. Langan, U.S. Dep't of Justice, *Felony Sentences in State Courts 2004*, Bureau of Justice Statistics Bull. (July 2007), at 1 ("95% of convicted felons pleaded guilty").

of uncovering that investigators acted improperly to cause such witness to manufacture a false allegation. *See, e.g.*, 18 U.S.C. § 3500 (government not required to disclose prior witness statements until the beginning of trial); *United States v. Ruiz*, 536 U.S. 622 (2002) (impeachment material not constitutionally required to be disclosed prior to a guilty plea). In the rare case where such misconduct is discovered, it is usually by pure fluke. *See, e.g., People v. Ramos*, 614 N.Y.S.2d 977 (N.Y. App. Div. 1st Dept. 1994).

Surely due process is offended by the fabrication of evidence that results in a false guilty plea, just as surely as a false jury conviction. "The greatest crime of all in a civilized society is an unjust conviction," wrote the hearing court in *Ramos*. "It is truly a scandal which reflects unfavorably on all participants in the criminal justice system." *People v. Ramos*, 614 N.Y.S.2d at 984. Yet, under Petitioners' formulation, the prosecutor who fabricates evidence and then uses it to coerce an innocent man's guilty plea does not just commit an unconstitutional act for which he is immunized; he commits no constitutional wrong at all.

CONCLUSION

For the foregoing reasons, and for the compelling reasons set forth in Respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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